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Judicial Disciplinary Proceedings in Minnesota

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NOTES

JUDICIAL DISCIPLINARY PROCEEDINGS IN MINNESOTA

Maintaining the integrity of the judiciary is important to society because of the predominant position occupied by judges. Historically, judicial disciplinary procedures were seldom used and thus were an ineffective response to judicial misconduct. In an effort to improve judicial conduct, the Minnesota Legislature in 1971 established the Minnesota Board on Judicial Standards and delegated to it broad authority to investigate and recommend discipline for improper judicial conduct. While Minnesota's present procedures generally comply with due process, further amendments to the procedures are necessary if they are to provide maximum protection of the constitutional rights of the persons involved. This Note traces the progression of judicial disciplinary procedures both in general and in Minnesota and further suggests changes to bring Minnesota procedures in line with due process requirements.

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I. INTRODUCTION

Judges perform a unique role in society.¹ They serve as trustees of the public² and are expected to be the exemplars of dignity and impartiality.³ A judge is expected to supervise litigation with scrupulous fairness⁴ and to apply the law fairly and objectively to the case before him.⁵ The judiciary must be independent and honorable;⁶ free from interference or control by all but the judicial establishment.⁷ Because of the enormous importance of the position, society necessarily exacts high standards from the judiciary.⁸ A judge is expected to maintain and enforce, as well as observe, these high standards.⁹

1. Comment, *Judicial Discipline, Removal, and Retirement*, 1976 Wis. L. REV. 563, 563 ("judiciary serves a unique role in the social framework").

2. See G. WINTERS & R. HANSON, *Preface to SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL* (G. Winters ed. 1973).

3. See *United States v. Cruz*, 455 F.2d 184, 185 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972); cf. *Nordmann v. National Hotel Co.*, 425 F.2d 1103, 1109 (5th Cir. 1970) (conduct of trial judges must be measured by standard of fairness and impartiality).

4. See *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1293 (5th Cir.) (judges vow to be fair), *cert. denied*, 419 U.S. 1096 (1974); *Pfizer Inc. v. Lord*, 456 F.2d 532, 544 (8th Cir.) (particular emphasis placed on judges conducting litigation with scrupulous fairness and impartiality), *cert. denied*, 406 U.S. 976 (1972).

5. See *Lawton v. Tarr*, 327 F. Supp. 670, 672 (E.D.N.C. 1971) (judge must read and interpret law as written); *In re Judge*, 357 So. 2d 172, 179 (Fla. 1978) ("Judges are required to follow the law and apply it fairly and objectively to all who appear before them"); G. WINTERS & R. HANSON, *supra* note 2.

The *Lawton* court stated:

The beginning of intellectual honesty in a judge is the recognition that, like other men, he has his own predilections and preferences and intellectual and philosophical attitudes that color and influence his viewpoints. . . . [Nevertheless] he must read, interpret and apply laws as written without regard to whether he would like to see them changed.

327 F. Supp. at 671-72.

6. *In re Hammond*, 224 Kan. 745, 745-46, 585 P.2d 1066, 1066 (1978) ("independent and honorable judiciary is indispensable to justice in our society"); *In re Laster*, 404 Mich. 449, 462, 274 N.W.2d 742, 746 (1979) (judiciary must be independent and honest).

7. See *Bonafield v. Cahill*, 125 N.J. Super. 78, 84, 308 A.2d 386, 389 (1973) ("hallmark of a judge is his independence and freedom from interference and control by any authority outside the judicial establishment"); cf. *In re Bennett*, 403 Mich. 178, 199, 267 N.W.2d 914, 922 (1978) (judge should act to preserve image of judiciary as independent).

8. Cf. *Pfizer Inc. v. Lord*, 456 F.2d 532, 544 (8th Cir.) ("We demand . . . of every trial judge in this circuit, a high standard of judicial performance"), *cert. denied*, 406 U.S. 976 (1972).

9. See *In re Hammond*, 224 Kan. 745, 746, 585 P.2d 1066, 1066-67 (1978) ("A judge should participate in establishing, maintaining and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be

When a judge's conduct offends the standards expected of the judiciary,¹⁰ such conduct may taint the public's image of the judiciary¹¹ as well as hamper the administration of justice.¹² To maintain the public's confidence in the courts,¹³ to insure the effective administration of jus-

preserved. . . . A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."'); *In re Bennett*, 403 Mich. 178, 199, 267 N.W.2d 914, 922 (1978) ("[A] judge . . . is bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions. Achievement of this goal demands that a judge, in a sense, behave as though he is always on the bench."); *In re Vasser*, 75 N.J. 357, 361, 382 A.2d 1114, 1116 (1978) (judge must uphold integrity and independence of judiciary and avoid appearance of impropriety); *cf.* *Pfizer Inc. v. Lord*, 456 F.2d 532, 544 (8th Cir.) (high standard of judicial performance demanded of judges; four qualities required of every judge: (1) to hear courteously, (2) to consider wisely, (3) to consider soberly, and (4) to decide impartially), *cert. denied*, 406 U.S. 976 (1972); *United States v. Cruz*, 455 F.2d 184, 185 (2d Cir.) (judge should be exemplar of dignity and impartiality), *cert. denied*, 406 U.S. 918 (1972); MINN. R. BD. JUDICIAL STANDARDS 4(a)(4), 9 MINN. STAT. 765, 767-68 (1980) (judge may be disciplined for conduct prejudicial to administration of justice or conduct unbecoming judicial officer).

10. *See, e.g., In re Laster*, 404 Mich. 449, 462, 274 N.W.2d 742, 746 (1979) (judge's conduct fell short of standard expected of him); *In re Bennett*, 403 Mich. 178, 184, 267 N.W.2d 914, 915 (1978) (conduct of judge was seriously unbecoming member of court); *In re McDonough*, 296 N.W.2d 648, 692-97 (Minn. 1979) (activities violated Code of Judicial Conduct), *modified*, 296 N.W.2d 699 (Minn. 1980); *In re Bartholet*, 293 Minn. 495, 500, 198 N.W.2d 152, 155 (1972) (particular acts under scrutiny showed lack of integrity and moral character on part of judge); *In re Cieminski*, 270 N.W.2d 321, 332 (N.D. 1978) (judge's acts were in contravention of judicial canons).

11. *See, e.g., In re Bonin*, 375 Mass. 680, 710, 378 N.E.2d 669, 676 (1978) (judge's actions created possibility that public would regard judge as subject to influence and did not promote public confidence in judiciary); *In re Laster*, 404 Mich. 449, 459, 274 N.W.2d 742, 744 (1979) ("[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges"); *In re Bennett*, 403 Mich. 178, 195, 267 N.W.2d 914, 922 (1978) (conduct of judge could only have eroded public confidence in judiciary); *In re McDonough*, 296 N.W.2d 648, 697 (Minn. 1979) (conduct of judge can injure judicial image), *modified*, 296 N.W.2d 699 (Minn. 1980); *In re Anderson*, 312 Minn. 442, 446, 252 N.W.2d 592, 594 (1977) (actions brought judicial office into disrepute).

12. *See, e.g., In re Laster*, 404 Mich. 449, 460, 274 N.W.2d 742, 745 (1979) (conduct was clearly prejudicial to administration of justice); *In re Anderson*, 312 Minn. 442, 446, 252 N.W.2d 592, 594 (1977) (same); *In re Heuermann*, 90 S.D. 312, 319, 240 N.W.2d 603, 607 (1976) (same).

13. *See In re Martin*, 295 N.C. 291, 301, 245 S.E.2d 766, 772 (1978) (commission empowered to determine whether judge should be disciplined to maintain public confidence in judicial system); *cf. In re McDonough*, 296 N.W.2d 648, 697 (Minn. 1979) (effective functioning of judicial system depends upon citizens feeling they are provided fair treatment and just decisions; conduct that injures judicial image may be subject to discipline), *modified*, 296 N.W.2d 699 (Minn. 1980). Disciplinary proceedings against lawyers have long been recognized as an effort by the court to protect the public. *See, e.g., In re Peterson*, 274 N.W.2d 922, 925 (Minn. 1979); *In re Streater*, 262 Minn. 538, 543, 115 N.W.2d 729, 733 (1962).

tice,¹⁴ and to maintain the integrity of the judicial system,¹⁵ judges are disciplined if they engage in inappropriate behavior.¹⁶

The purpose of this Note is to discuss and analyze Minnesota's judicial disciplinary proceedings. First, the traditional methods of judicial discipline will be discussed.¹⁷ Second, Minnesota's judicial discipline procedures and their treatment by the Minnesota Supreme Court will be discussed and analyzed.¹⁸ Third, various challenges to judicial disciplinary proceedings will be analyzed to determine whether Minnesota's procedures will be able to overcome these potential challenges.¹⁹ Finally, in an effort to provide greater protection of the rights of the individuals involved and to improve the nature of the proceedings, changes in Minnesota's procedures will be proposed.²⁰

II. HISTORICAL BACKGROUND OF JUDICIAL DISCIPLINE

The traditional methods of judicial discipline in the United States include address, impeachment, and recall.²¹ Because these heavily criti-

14. See *Nicholson v. Judicial Retirement & Removal Comm'n*, 562 S.W.2d 306, 308 (Ky. 1978) (purpose of disciplinary proceeding is to improve quality of justice administered); *In re Cieminski*, 270 N.W.2d 321, 326 (N.D. 1978) (aim of proceeding is to maintain proper administration of justice); MINN. STAT. § 490.16(3) (1980) (judge may be removed for conduct prejudicial to administration of justice).

15. Cf. *In re Bartholet*, 293 Minn. 495, 499-500, 198 N.W.2d 152, 155 (1972) (judge disciplined for lacking sense of fidelity owed by judges to public); *In re Storie*, 574 S.W.2d 369, 373 (Mo. 1978) (purpose of procedure is to maintain standards of judicial fitness); *In re Cieminski*, 270 N.W.2d 321, 326 (N.D. 1978) (proceedings are to maintain honor and dignity of judiciary).

16. See, e.g., *In re McDonough*, 296 N.W.2d 648 (Minn. 1979), *modified*, 296 N.W.2d 699 (Minn. 1980); *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (per curiam); *In re Anderson*, 312 Minn. 442, 252 N.W.2d 592 (1977).

17. See notes 21-24, 51-53 *infra* and accompanying text.

18. See notes 54-200 *infra* and accompanying text.

19. See notes 113-303 *infra* and accompanying text.

20. See notes 219-25, 232-34, 261, 306-07 *infra* and accompanying text.

21. See W. BRAITHWAITE, *WHO JUDGES THE JUDGES?* 12 (1971); Comment, *supra* note 1, at 564. Other early methods of discipline included executive action, defeat at election, and bar association action. See Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 1 (1977).

Address is a formal request from the legislature to the governor asking him to remove a judge and is used when the judge's conduct does not warrant impeachment. See W. BRAITHWAITE, *supra*, at 12; Cameron, *The Inherent Power of a State's Highest Court to Discipline the Judiciary*, 54 CHI.-KENT L. REV. 45, 45 n.3 (1977).

Impeachment is a criminal proceeding against a public official instituted by written charges called "articles of impeachment." The lower house of the legislature acts as a grand jury and the upper house sitting as a court tries the charges. Removal normally requires a two-thirds vote. See W. BRAITHWAITE, *supra*, at 12; Schoenbaum, *supra*, at 5; cf. MINN. CONST. art. VIII, § 1 ("The house of representatives has the sole power of impeachment through a concurrence of a majority of all its members. All impeachments shall be tried by the senate. When sitting for that purpose, senators shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the

cized methods²² have rarely been used,²³ they have failed to alleviate most judicial misconduct.²⁴ In response to that failure two new procedures were developed by the states²⁵—the Court on the Judiciary²⁶ and the Commission on Judicial Standards.²⁷

The Court on the Judiciary was established by New York in 1947, solely to hear charges of misconduct against judges.²⁸ Consisting of six judges sitting as a result of their position on other courts,²⁹ the court was convened by written request of certain authorities or by motion of the chief judge of the court of appeals.³⁰ Once convened, hearings were conducted on the charges; for good cause the court could remove or retire

concurrence of two-thirds of the senators present.”). For a discussion of the two cases of impeachment in Minnesota, see note 51 *infra*.

Recall is similar to initiative and referendum; the process begins by submission of a petition that requests a recall proposition be placed on the ballot. The electorate then votes for or against removal of the judge. See W. BRAITHWAITE, *supra*, at 12; Schoenbaum, *supra*, at 8.

22. Impeachment and recall have been criticized as too time consuming, expensive, and cumbersome. See Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L. REV. 244, 250 (1969), reprinted in G. WINTERS & R. HANSON, *supra* note 2, at 60-74. Address and impeachment are ineffective methods of discipline because of shortcomings in the legislative process. Legislators lack the ability to undertake the role of judge and the legislative body lacks a method by which to screen and investigate complaints or allegations against the judiciary. See Comment, *supra* note 1, at 366.

23. In the period from 1928 to 1948 only three impeachment proceedings were instituted against judges of the appellate and trial courts. The judges prevailed in all three prosecutions. See Miller, *Discipline of Judges*, 50 MICH. L. REV. 737, 737 (1952). Research by one commentator failed to uncover any instances of address or recall in the three decades preceding 1971. See W. BRAITHWAITE, *supra* note 21, at 13.

24. See Comment, *supra* note 1, at 566-67 (judicial misconduct and disability have been left unsolved by traditional procedures of discipline); cf. W. BRAITHWAITE, *supra* note 21, at 12 (evidence on effectiveness of traditional procedures of discipline is scant); Brand, *The Discipline of Judges*, 46 A.B.A.J. 1315, 1316 (1960) (impeachment and address are inadequate methods of discipline).

25. See Schoenbaum, *supra* note 21, at 23 (present methods developed because of dissatisfaction with earlier ineffective methods of judicial discipline); Comment, *supra* note 1, at 566-67 (“The emergence of new plans in recent years may be viewed as a reflection of an increased awareness of the need for workable machinery to deal with the problems . . . left unsolved by the traditional procedures.”).

26. See, e.g., DEL. CONST. art. IV, § 37; OKLA. CONST. art. VII-A, § 1.

27. See, e.g., CAL. CONST. art. VI, § 8; MICH. CONST. art. VI, § 30 (Judicial Tenure Commission).

28. See N.Y. CONST. art. VI, § 9-a (1947, repealed 1962).

29. See *id.* § 22(b) (1961, repealed 1977) (“court on the judiciary shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals, and one justice of the appellate division of the supreme court in each judicial department”). There are four judicial departments of the appellate division of the supreme court.

30. See *id.* § 22(d) (1961, repealed 1977) (authorities who could convene court by written request were governor, presiding justice of appellate division of supreme court, or majority of executive committee of New York State Bar Association).

the particular judge involved.³¹

Unfortunately, New York's Court on the Judiciary was a rarely used³² and ineffective disciplinary procedure.³³ The court's failure is attributable to a number of factors. First, there was no permanent staff to receive and investigate complaints.³⁴ Second, the proceedings lacked confidentiality,³⁵ were cumbersome, and were time consuming.³⁶ Finally, in those situations in which removal or retirement was not warranted, the court was powerless to act because no other disciplinary sanctions existed.³⁷ In an effort to correct this problem, New York and the three other jurisdictions that initially adopted this approach³⁸ have either supplemented or replaced their Court on the Judiciary with a Commission on Judicial Standards or Qualifications.³⁹

31. See *id.* § 22(a) (1961, repealed 1977). Although removal and retirement were the only two methods of discipline, the Court on the Judiciary could disqualify the judge from holding any public office in the state. See *id.* § 22(b) (1961, repealed 1977). The court had the power to remove or retire any judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court or judge of the family court. See *id.* § 22(a) (1961, repealed 1977). A judge could be removed or retired by the concurrence of four or more members of the court. See *id.* § 22(c) (1961, repealed 1977).

32. See I. TESITOR, JUDICIAL CONDUCT ORGANIZATIONS 2 (1973) (court convened twice during its first 18 years); Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166, 167 (1963) (although created in 1947, Court on Judiciary first met in 1959); Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149, 185 (1966).

33. Cf. Stern, *New York's Approach to Judicial Discipline: The Development of a Commission System*, 54 CHI.-KENT L. REV. 137, 138 (1977) (system did not achieve its goals); Comment, *supra* note 1, at 568 (California system has received more widespread approval than New York system).

34. See W. BRAITHWAITE, *supra* note 21, at 66; Stern, *supra* note 33, at 139 (there was no staff exclusively assigned to monitor judiciary, identify problem areas or commence investigation in absence of complaint); Note, *supra* note 32, at 185.

35. See W. BRAITHWAITE, *supra* note 21, at 66; I. TESITOR, *supra* note 32, at 1 ("court lacked an appropriate confidential mechanism for screening complaints and investigating alleged misconduct"); Note, *supra* note 32, at 190; cf. Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look*, 40 FORDHAM L. REV. 1, 23 (1971) (judge under investigation may suffer from adverse publicity).

36. Gasperini, Anderson & McGinley, *supra* note 35, at 23.

37. See W. BRAITHWAITE, *supra* note 21, at 67; I. TESITOR, *supra* note 32, at 1-2. Despite the criticisms directed at the New York Court on the Judiciary, the system was considered an improvement over the more traditional methods of judicial discipline. See W. BRAITHWAITE, *supra* note 21, at 65; Gasperini, Anderson & McGinley, *supra* note 35, at 23; Comment, *supra* note 1, at 568.

38. Delaware, Illinois, and Oklahoma also initially adopted the system of a Court on the Judiciary, but have since established Commissions on Judicial Standards or Qualifications. See I. TESITOR, *supra* note 32, at 2.

39. See N.Y. CONST. art. VI, § 22; Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.-KENT L. REV. 69, 69; cf. I. TESITOR, *supra* note 32, at 2 (other states which began with special court procedure have now added investigatory bodies to screen complaints before court hears them). For a general discussion of New York's Court on the Judiciary, see W. BRAITHWAITE, *supra* note 21, at 56-67; Gasperini,

In 1960, California became the first state to create a Commission on Judicial Qualifications.⁴⁰ The Commission⁴¹ investigates complaints filed against California judges.⁴² If the preliminary investigation indicates there is good cause for discipline, the judge may be admonished privately or formal disciplinary proceedings may be instituted.⁴³ After formal proceedings are completed, the California Supreme Court, upon recommendation of the Commission, may censure, remove, or retire the judge under investigation.⁴⁴

The California system has proven effective.⁴⁵ The system is capable of handling a large number of complaints and eliminating unwarranted complaints at the initial stage.⁴⁶ An independent staff aids the Commis-

Anderson & McGinley, *supra* note 35. For a discussion of the present Illinois system, see Greenberg, *supra*. For a general discussion of the beginning of the Oklahoma system, see Hays, *An Oklahoma View: The Discipline and Removal of Judges*, 50 JUDICATURE 64 (1966), reprinted in G. WINTERS & R. HANSON, SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL 95-97 (G. Winters ed. 1973).

40. See Schoenbaum, *supra* note 21, at 20 & n.112. The Commission was created by constitutional amendment in 1960. See CAL. CONST. art. VI, § 1(b) (1960, repealed 1966). The Commission has been renamed the Commission on Judicial Performance. The Commission's constitutional authority is now codified at article six, sections eight and eighteen, of the California Constitution.

41. The Commission is composed of

2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar who have practiced law in this State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor . . . and approved by [a majority of] the Senate.

CAL. CONST. art. VI, § 8.

42. The Commission has the authority to make a preliminary inquiry upon receipt of a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a judge is guilty of wilful misconduct in office, persistent failure or inability to perform his duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that he has a disability that seriously interferes with the performance of his duties and is or is likely to become permanent, or that he has engaged in an improper action or a dereliction of duty

CAL. R. CT. 904(a).

43. *Id.* 904(d). Private admonishment is the only disciplinary sanction the Commission possesses and this action is subject to review by the California Supreme Court. See CAL. CONST. art. VI, § 18(c); CAL. R. CT. 904(d).

44. See CAL. CONST. art. VI, § 18(c); CAL. R. CT. 919(a)-(d). The recommendations must be certified by the Commission's chairman or secretary and are filed with the clerk of the supreme court. See *id.* 919(a). When the Commission's recommendation involves a judge of the supreme court, the recommendations are reviewed by a tribunal of judges from the court of appeals, selected by lot. See CAL. CONST. art. VI, § 18(e); CAL. R. CT. 921(a).

45. See W. BRAITHWAITE, *supra* note 21, at 93-94; cf. Frankel, *supra* note 32, at 170 (Commission in its first two years of operation considered 163 matters, resulting in removal or resignation of 10 judges).

46. See Frankel, *supra* note 32, at 170 ("[u]nwarranted complaints and groundless charges are closed at the initial stage"); cf. Gasperini, Anderson & McGinley, *supra* note

sion in screening and evaluating complaints and thus ensures an objective determination on the merits.⁴⁷ Cases of misconduct are handled expeditiously, confidentially, and economically.⁴⁸ The Commission has had a noticeable effect in improving judicial behavior and deterring judicial misconduct.⁴⁹ As a result, the California system has become the model for judicial disciplinary bodies in a majority of states.⁵⁰

III. JUDICIAL DISCIPLINE IN MINNESOTA

Historically, impeachment⁵¹ and executive removal⁵² were the only

35, at 30 (over half of complaints are found to be unwarranted or beyond jurisdiction of Commission, other complaints apparently valid but of little significance may be disposed of if satisfactorily explained by judge).

47. See W. BRAITHWAITE, *supra* note 21, at 94.

48. See *id.* at 93-94; Buckley, *supra* note 22, at 255 (proceedings are confidential until recommendation of discipline is made to supreme court); Gasperini, Anderson & McGinley, *supra* note 35, at 31 (confidentiality is one of foundations of California's system).

49. See Buckley, *supra* note 22, at 257; Frankel, *supra* note 32, at 171; Gasperini, Anderson & McGinley, *supra* note 35, at 31-32; Comment, *supra* note 1, at 570. For a more critical view of the California system, see Note, *Judicial Discipline in California: A Critical Re-Evaluation*, 10 LOY. L.A.L. REV. 192 (1976).

50. See I. TESITOR, *supra* note 32, at 2-4, 10-14 (Table); Gillis & Fieldman, *Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach*, 54 CHI.-KENT L. REV. 117, 117 (1977) (46 states have followed California's lead in formulating new administrative systems to deal more effectively with problem of judicial misconduct and incompetence); Schoenbaum, *supra* note 21, at 21. Some states have made innovations on the California system and have adopted a two-tiered approach to judicial discipline. Under the two-tiered approach the commission receives and investigates complaints and when probable cause for the complaint is found by the commission the charges are presented to a separate board or court for adjudication. Approximately eight states have adopted such an approach. See I. TESITOR, *supra* note 32, at 2. For a discussion of one state's two-tiered system, see Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, *supra* note 39.

51. MINN. CONST. art. VIII, § 1 provides that "[t]he house of representatives has the sole power of impeachment through a concurrence of a majority of all its members. All impeachments shall be tried by the senate."

The "judges of the supreme and district courts may be impeached for corrupt conduct in office or for crimes and misdemeanors." *Id.* § 2. No officer may exercise the duties of his office after he has been impeached and before his acquittal. *Id.* § 3.

In Minnesota there have been at least two instances in which a judge has been impeached by the house and tried by the senate. Judge Sherman Page of the tenth judicial district was impeached by the Minnesota House of Representatives on March 4, 1878. See MINN. H.R. JOUR. 577-84 (1878). The charges that formed the basis of impeachment were based on petitions submitted to the house by the county auditor and other individuals. See *id.* at 54, 577-84. The county auditor's petition stated Judge Page's character was "incompatible with the dignity and sacredness of the high position to which he had been called" and many of his official acts were "improper, disreputable and illegal." See *id.* at 577. After an investigation by its judiciary committee, the house charged Judge Page with 10 articles of impeachment. See *id.* at 91, 97, 558-72.

The senate then tried the case over the course of more than 25 days. See generally JOUR. OF THE S. OF MINN. SITTING AS A HIGH COURT OF IMPEACHMENT FOR THE TRIAL OF HON. SHERMAN PAGE, JUDGE OF THE TENTH JUDICIAL DISTRICT, 20th Sess. (1878).

ways to discipline judges in Minnesota. Unfortunately these traditional

Over 75 witnesses were subpoenaed to appear at the proceedings. *See id.* vol. 1, at 160-61. The record of the proceedings totalled over 1400 pages. On the final day of the trial, June 28, 1878, a vote was taken by the senate on each article of impeachment. Judge Page was acquitted of every charge. *See id.* vol. 3, at 365-70. The impeachment trial apparently was viewed with disdain by some Minnesotans since one person was prompted to write a short satirical play on the impeachment trial. *See generally* P. SIMMONS, *THE HIGH OLD COURT OF IMPEACHMENT—OR—"AS GOOD AS A PLAY" IN THREE ACTS* (O. Dodge ed. 1878). P.E.R. Simmons was a pseudonym of the author, Dewitt Clinton Cooley. *See id.*

Three years later a second Minnesota judge, the Honorable E. St. Julien Cox, was impeached by a vote of 78 to 13. MINN. H.R. JOUR. 264 (1881). Judge Cox had been under investigation by the house as early as 1878, based on an allegation in the St. Paul Pioneer Press that he had been intoxicated while presiding at court in Fairmont, Minnesota. *See id.* at 207 (1878).

Judge Cox was charged with 20 articles of impeachment. *See id.* at 256-64 (1881). Articles I through XVII charged that the judge had tried cases while intoxicated. *See id.* at 256-63. Article XVIII accused the judge of habitual drunkenness; articles XIX and XX claimed that the judge had on at least two occasions demeaned himself and brought the judicial office into disrepute by cavorting with and frequenting the company of prostitutes. *See id.* at 263-64.

The trial began in early January of 1882 and ended on March 22, 1882. *See generally* JOUR. OF THE S. OF MINN. SITTING AS A HIGH COURT OF IMPEACHMENT FOR THE TRIAL OF HON. E. ST. JULIEN COX, JUDGE OF THE NINTH JUDICIAL DISTRICT, 22d Sess. (1881-1882). The trial produced a record of over 3,000 pages. Six of the articles were dismissed including the two involving claims of association with prostitutes. *See id.* vol. 1, at 1002-04. Judge Cox was acquitted of seven other articles. *See id.* vol. 3, at 2913-62. Judge Cox was, however, convicted on seven counts of intoxication while presiding on the bench. *See id.* vol. 3, at 2985-88. Upon Judge Cox's conviction the senate disqualified the judge from holding any judicial office in the state for a period of three years. *See id.* vol. 3, at 2989.

52. MINN. STAT. § 351.03 (1980) provides in part: "The governor may remove from office any . . . judge of probate, judge of any municipal court, [or] justice of the peace . . . when it appears to him by competent evidence, that either has been guilty of malfeasance or nonfeasance in the performance of his official duties." The rules of the Board on Judicial Standards, however, provide that the Board has exclusive jurisdiction over full-time judges. *See* MINN. R. BD. JUDICIAL STANDARDS 2(c), 9 MINN. STAT. 765, 767 (1980). *State ex rel. Martin v. Burnquist*, 141 Minn. 308, 170 N.W. 201 (1918), is the only reported decision in which the Governor exercised his power to remove a judge from the bench. Plaintiff was a probate judge who because of his continued and vocal opposition to the United States' entry into World War I and his professed sympathy with the cause of Germany was removed from office by defendant-Governor. The statute authorizing the Governor's action was substantially similar to the present statute and allowed the Governor to remove a judge when it appeared that he had been guilty of nonfeasance or malfeasance. *Id.* at 319-20, 170 N.W. at 202.

The court ruled that the removal proceedings were clearly improper. *Id.* at 321-22, 170 N.W. at 203. The court stated that "[t]he misconduct or malfeasance under our law must have direct relation to and be connected with the 'performance of official duties,' and amount either to maladministration, or to willful and intentional neglect and failure to discharge the duties of the office at all." *Id.* at 322, 170 N.W. at 203. The court vacated the order of the Governor removing the judge from office. *Id.* at 323, 170 N.W. at 203.

There is one other instance of executive removal in Minnesota's history. The first supreme court justice of the Minnesota territory, Aaron Goodrich, was removed from office by President Fillmore. *See United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 301 (1854); Voight, *Aaron Goodrich: Stormy Petrel of the Territorial Bench*, 39 MIN-

methods were ineffective and rarely used.⁵³ In 1971, the Minnesota Legislature, following California's lead, created the Minnesota Board on Judicial Standards.⁵⁴ The creation of the Board has rendered the traditional methods of judicial discipline obsolete.⁵⁵

A. Powers and Procedures of the Board on Judicial Standards

The Board is composed of nine members—three judges, two lawyers, and four laypersons.⁵⁶ All of the Board's members are appointed by the Governor, subject to senate approval.⁵⁷ Each member is appointed to a four-year term and no person may serve more than two terms.⁵⁸ The

MINNESOTA HISTORY 141, 151 (1964-1965). Apparently the removal of the judge was motivated by political considerations. *Id.* at 148-51.

Minnesota has considered at least one other method of judicial discipline. In 1913, the state legislature passed a bill that proposed amending the constitution to provide for a recall of public officers by the voters of the state or of the electoral district for which the officer was elected. *See* Act of Apr. 16, 1913, ch. 593, 1913 Minn. Laws 102. The act provided that the proposed amendment to the constitution be submitted to the voters of the state at the next general election. *Id.* at 902-03. The proposed amendment was rejected.

53. There are only five instances of disciplinary action against judges in Minnesota's history prior to the creation of the Board on Judicial Standards. *See In re Bartholet*, 293 Minn. 495, 198 N.W.2d 152 (1972); notes 51-52 *supra*.

54. Act of June 7, 1971, ch. 909, §§ 1-4, 1971 Minn. Laws 1862, 1862 (current version at MINN. STAT. §§ 490.15-16 (1980)); Act of May 11, 1973, ch. 214, § 1, 1973 Minn. Laws 417, 417 (current version at MINN. STAT. § 490.18 (1980)).

55. Since the Board's creation in 1971, there have been no instances of impeachment or executive removal. Six judges, however, have been removed, suspended, fined, or censured by the supreme court following a formal investigation and report by the Board. *See In re Roberts*, Finance and Commerce, Jan. 23, 1981, at 2, col. 2 (Minn. Jan. 20, 1981); *In re Mann*, No. 50982 (Minn. Mar. 5, 1980); *In re McDonough*, 296 N.W.2d 648 (Minn. 1979), *modified*, 296 N.W.2d 699 (Minn. 1980); *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (*per curiam*); *In re Sandeen*, No. 48183 (Minn. Oct. 27, 1977); *In re Anderson*, 312 Minn. 442, 252 N.W.2d 592 (1977). The Board also has investigated a number of other complaints and when appropriate taken some form of action. *See* notes 106-07 *infra* and accompanying text.

56. *See* MINN. STAT. § 490.15(1) (1980) (Board "consists of one judge of the district court, one judge of a municipal court, one judge of a county court, two lawyers who have practiced law in the state for ten years and four citizens who are not judges, retired judges or lawyers").

57. *See id.* Alternate members who substitute for disqualified or absent members are selected and appointed in the same manner as regular members. MINN. R. BD. JUDICIAL STANDARDS 1(b), 9 MINN. STAT. 765, 766 (1980).

The current rules of the Board on Judicial Standards are based in substantial part on the ABA Standards. *See* Interview with George J. Kurvers, Executive Secretary of the Board on Judicial Standards (Apr. 3, 1981) (on file at William Mitchell Law Review office). *Compare* MINN. R. BD. JUDICIAL STANDARDS 8(d), 9 MINN. STAT. 765, 770 (1980) with ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENTS §§ 5.4-.7 (Approved Draft 1978) [hereinafter cited as STANDARDS RELATING TO JUDICIAL DISCIPLINE].

58. *See* MINN. STAT. § 490.15(1) (1980); MINN. R. BD. JUDICIAL STANDARDS 1(c), 9 MINN. STAT. 765, 766 (1980). "A member selected to serve the remainder of an unexpired

Board has an Executive Secretary who is appointed by the Board.⁵⁹ The Board has exclusive jurisdiction over the conduct of "anyone exercising judicial powers and performing judicial functions, including judges assigned to administrative duties within the judicial branch."⁶⁰ Grounds for discipline include: a felony conviction; willful misconduct in office; willful misconduct unrelated to judicial duties that brings the judicial office into disrepute; conduct that is prejudicial to the administration of justice or unbecoming a judicial officer; and conduct that violates the codes of judicial conduct or professional responsibility.⁶¹

term shall not be considered to have served the equivalent of a full four-year term for purposes of this section." *Id.* 1(c)(2), 9 MINN. STAT. at 766.

59. *See* MINN. STAT. § 490.15(1) (1980); MINN. R. BD. JUDICIAL STANDARDS 1(a), 9 MINN. STAT. 765, 765 (1980). The executive secretary's term of office is not limited by statute or by the Rules of the Board on Judicial Standards.

60. MINN. R. BD. JUDICIAL STANDARDS 2(b), 9 MINN. STAT. 765, 767 (1980); *cf.* MINN. STAT. § 490.18 (1980) (provisions establishing Board on Judicial Standards apply to "all judges, judicial officers, referees and justices of the peace").

The Board has exclusive jurisdiction over full-time judges and the conduct of part-time judges acting in a judicial capacity. *See* MINN. R. BD. JUDICIAL STANDARDS 2(c), 9 MINN. STAT. 765, 767 (1980). Jurisdiction over full-time judges "shall include conduct that occurred prior to a judge assuming judicial office." *Id.*

61. MINN. R. BD. JUDICIAL STANDARDS 4(a)(1)-(5), 9 MINN. STAT. 765, 767-68 (1980); *cf.* MINN. STAT. § 490.16(3) (1980) ("[o]n recommendation of the board on judicial standards, the supreme court may . . . censure or remove a judge for action or inaction that may constitute persistent failure to perform his duties, incompetence in performing his duties, habitual intemperance or conduct prejudicial to the administration of justice"). One judge has been disciplined for violation of the judicial code. *See In re Anderson*, 312 Minn. 442, 447-49, 252 N.W.2d 592, 594-95 (1977).

If the judge's conduct is such that he is charged with a serious crime, he may be suspended immediately without the necessity of Board action. *See* MINN. R. BD. JUDICIAL STANDARDS 7(a), 9 MINN. STAT. 765, 769 (1980) (judge suspended with pay immediately upon filing of indictment of information charging him with felony under state or federal law); *id.* 7(b), 9 MINN. STAT. at 769 (conduct resulting in misdemeanor charges may be grounds for immediate suspension with pay by supreme court if conduct adversely affects his ability to perform duties of office). The favorable or unfavorable disposition of criminal charges does not affect the ability of the Board to bring disciplinary charges against the judge. *See id.* 7(a)-(b), 9 MINN. STAT. at 769. For a discussion of the constitutionality of interim suspension, see notes 235-44 *infra* and accompanying text.

The Board also has the authority to investigate allegations that a judge is physically or mentally disabled. MINN. R. BD. JUDICIAL STANDARDS 2(a), 9 MINN. STAT. 765, 767 (1980); *cf.* MINN. STAT. § 490.16(3) (1980) ("[o]n recommendation of the board on judicial standards, the supreme court may retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent").

The Board also has the authority to investigate complaints concerning a judge's compliance with Minnesota Statutes section 546.27. MINN. R. BD. JUDICIAL STANDARDS 2(a)(4), 9 MINN. STAT. 765, 767 (1980). This statute states in part:

All questions of fact and law, and all motions and matters submitted to a judge for his decision, shall be disposed of and his decision filed with the clerk within 90 days after such submission, unless sickness or casualty shall prevent, or the time be extended by written consent of the parties.

MINN. STAT. § 546.27(1) (1980). The Board is required to review annually the compli-

1. *Informal Investigation*

An inquiry into the propriety of a particular judge's conduct may be instituted by the Board itself⁶² or at the request of a member of the general public.⁶³ The Executive Secretary of the Board conducts the initial investigation⁶⁴ and determines whether the complaint should be presented to the Board or dismissed for lack of sufficient evidence.⁶⁵ In practice, however, the results of such investigation always are submitted to the Board for its consideration.⁶⁶

The Board is not required to notify the judge that a complaint has been filed against him. Unless the judge is notified within ninety days following receipt of the complaint no disciplinary action may be taken as a result of the complaint and the complaint may not be used against the judge in a disciplinary proceeding.⁶⁷

The Board's initial responsibility is to determine whether the Executive Secretary's investigation establishes probable cause to proceed.⁶⁸ If

ance of each district, county, municipal, and probate judge with this provision. *Id.* § 546.27(2).

One judge has been suspended for failure to comply with this requirement, as well as for other acts of misconduct. *See In re Anderson*, 312 Minn. 442, 445-49, 252 N.W.2d 592, 593-95 (1977).

62. *See* MINN. R. BD. JUDICIAL STANDARDS 6(a)(2), 9 MINN. STAT. 765, 768 (1980) ("board may on its own motion make inquiry with respect to whether a judge is guilty of misconduct"). In the *McDonough* decision, a claim was made that the Board was without proper authorization because there was no sworn grievance or motion of the Board initiating the investigation. The court considered this violation only technical because a complaint was filed and a consensus of the Board was in favor of the investigation. *In re McDonough*, 296 N.W.2d 648, 688 (Minn. 1979), *modified*, 296 N.W.2d 699 (Minn. 1980).

63. *See* MINN. R. BD. JUDICIAL STANDARDS 6(a)(1), 9 MINN. STAT. 765, 768 (1980) (inquiry "may be initiated upon any reasonable basis, including oral or written complaints made by judges, lawyers, court personnel, or members of the general public").

64. *See id.* 1(e)(4), 9 MINN. STAT. at 766; *id.* 6(c)(1), 9 MINN. STAT. at 769.

65. *Id.* 6(c)(2), 9 MINN. STAT. at 769.

66. Interview with George J. Kurvers, *supra* note 57, at 1; *cf.* MINN. R. BD. JUDICIAL STANDARDS 6(e)(1), 9 MINN. STAT. 765, 769 (1980) ("board shall promptly consider the results of an investigation and evaluation conducted by the executive secretary").

67. MINN. R. BD. JUDICIAL STANDARDS 6(d), 9 MINN. STAT. 765, 769 (1980) provides:

(1) Notice that a complaint has been made may be given to the judge named in the complaint.

(2) No action shall be taken on any complaint in which the judge is not notified within 90 days after the receipt of such complaint, and if not notified the complaint cannot be used against the judge.

Id.

The rules are unclear on the applicability of subdivision 2 when the investigation is initiated by the Board itself rather than the result of a complaint by a member of the general public. Arguably, the 90-day period would begin to run on the date the executive secretary is authorized to investigate the conduct of the judge.

68. Probable cause is not defined by the rules. One jurisdiction has indicated the term requires the judicial disciplinary body "to determine to a reasonable certainty the probability that a violation of the Judicial Code of Ethics has been committed and the

probable cause is not found, the Board may issue a private reprimand,⁶⁹ or, by informal adjustment, inform the judge that his conduct is or may be the cause for discipline,⁷⁰ direct the judge to seek professional counseling or assistance,⁷¹ or impose conditions on the judge's conduct.⁷² If, on the other hand, probable cause does exist, the Board conducts a formal investigation.⁷³

probability that the judge under investigation has committed it." *In re Van Susteren*, 82 Wis. 2d 307, 311-12, 262 N.W.2d 133, 136 (1978).

MINN. R. BD. JUDICIAL STANDARDS 6(e)(2), 9 MINN. STAT. 765, 769 (1980) requires that a majority of the full Board concur in a finding of probable cause.

69. MINN. R. BD. JUDICIAL STANDARDS 6(g)(1), 9 MINN. STAT. 765, 769 (1980).

70. *Id.* 6(g)(2)(i), 9 MINN. STAT. at 769.

71. *Id.* 6(g)(2)(ii), 9 MINN. STAT. at 769.

72. *Id.* 6(g)(2)(iii), 9 MINN. STAT. at 769.

Rule 6(g) has an analogous provision in the ABA Standards. *Compare id.* 6(g), 9 MINN. STAT. at 769 with STANDARDS RELATING TO JUDICIAL DISCIPLINE, *supra* note 57, § 6.6.

Both rules grant a wide scope of discretion that allows the Board to impose conditions on the judge's conduct without review, unless the judge decides to appeal the decision and make the matter public. *See* Todd & Proctor, *Burden of Proof, Sanctions, and Confidentiality*, 54 CHI.-KENT L. REV. 177, 185 (1977).

The Commentary to Rule 6.6 gives the following justification for the rule:

Occasionally a judge will be guilty of misconduct through inadvertence or a lack of understanding as to the high ethical demands of the code of judicial conduct. Sometimes the fact that the commission has brought a judge's behavior to his attention will be sufficient to induce him to avoid such conduct in the future.

Occasionally the conduct complained of is of an involuntary nature . . . and the judge may need professional counseling or other assistance in order to regain effective control over his behavior. On other occasions, further guidance in how to carry out his judicial duties more effectively may be called for.

The commission may recommend that the judge avoid certain conduct that appears to be questionable. If, for example, the judge is having a drinking problem the commission may impose a condition that the judge attend an alcohol treatment program, or that he refrain from the use of alcoholic beverages during the day, or altogether.

When an informal adjustment or private reprimand is used, it should be conditioned upon the judge acknowledging that he is aware that he is waiving his right to a hearing. The informal adjustment or private reprimand should not serve as a bar to further proceedings based on similar misconduct or conduct of a different nature that together with the prior conduct would have a negative cumulative effect upon the judge's integrity or the appearance of fair and impartial behavior. By consenting to the informal adjustment or private reprimand the judge is making a knowing waiver of his right to object to the findings that are the basis for this disposition being used against him at a subsequent hearing and in subsequent impositions of discipline. The judge should be fully advised by the commission that the result of the acceptance of private dispositions is the waiving of these rights. Therefore, the judge should be required to accept an informal adjustment or private reprimand in writing.

STANDARDS RELATING TO JUDICIAL DISCIPLINE, *supra* note 57, § 6.6, Commentary.

73. *See* MINN. R. BD. JUDICIAL STANDARDS 6(e)(1), 8, 9 MINN. STAT. 765, 769, 770 (1980). The confidential nature of the proceedings ceases when there has been a "determination of probable cause and formal charges have been filed." *Id.* 5(a)(1), 9 MINN. STAT. at 768.

For a discussion of the purpose of the rule on confidentiality, see Peskoe, *Procedures For*

2. Formal Proceedings

When sufficient cause to proceed exists, the complainant⁷⁴ files a sworn complaint⁷⁵ that is served upon the judge.⁷⁶ The judge must respond to the complaint in writing within twenty days.⁷⁷ If, after reviewing the judge's response, the Board decides to continue the proceeding⁷⁸ it files formal charges against the judge with the Executive Secretary.⁷⁹

After formal charges have been filed, a public hearing is scheduled.⁸⁰ The judge is served with the formal charges and must respond to them in writing within twenty days.⁸¹ Generally, the date selected for the hearing is within thirty days following receipt of the judge's response.⁸²

Judicial Discipline: Type Of Commission, Due Process & Right To Counsel, 54 CHI-KENT L. REV. 147, 160-62 (1977).

74. The initial complainant may be a judge, a lawyer, court personnel, the Board itself, or a member of the general public. MINN. R. BD. JUDICIAL STANDARDS 6(a)(1)-(2), 9 MINN. STAT. 765, 769 (1980). The rules are unclear regarding the process when the investigation is initiated by the Board. The executive secretary, apparently at the Board's direction, prepares a statement of allegations. See Interview with George J. Kurvers, *supra* note 57, at 2.

75. MINN. R. BD. JUDICIAL STANDARDS 8(a)(1), 9 MINN. STAT. 765, 770 (1980). If a sworn complaint is not obtained, a statement of the allegations and the facts must be prepared by the executive secretary. *Id.* "Where more than one act of misconduct is alleged, each shall be clearly set forth." *Id.*

76. *Id.* 8(a)(2), 9 MINN. STAT. at 770. Service must be in accordance with the Rules of Civil Procedure. *Id.*

77. *Id.* 8(a)(3), 9 MINN. STAT. at 770. In lieu of or in addition to this written response, the judge may make a personal appearance. *Id.* If the judge appears personally his statement is recorded. *Id.*

78. At this point in the proceeding or anytime thereafter, the Board may terminate the proceedings and give notice to all complainants and the judge that the Board has found insufficient cause to proceed. *Id.* 8(b), 9 MINN. STAT. at 770. Unlike the situation in which a similar determination is made following the Board's consideration of the executive secretary's investigation, there does not appear to be any sanctions that the Board may impose on the judge at this stage of the proceeding. See notes 69-72 *supra* and accompanying text.

79. See MINN. R. BD. JUDICIAL STANDARDS 8(c)(1), 9 MINN. STAT. 765, 770 (1980). Confidentiality ceases upon filing of the statement. *Id.*

Generally, all proceedings are confidential until there has been a determination of probable cause and formal charges filed. *Id.* 5(a), 9 MINN. STAT. at 768. If the inquiry was initiated as a result of notoriety or conduct that is of public record, however, information regarding the lack of cause to proceed shall be released by the Board. *Id.* 6(f)(3), 9 MINN. STAT. at 769.

80. *Id.* 8(d)(1), 9 MINN. STAT. at 770. "The judge and all counsel shall be notified of the time and place of the hearing." *Id.*

81. See *id.* 8(c)(2), 9 MINN. STAT. at 770.

82. See *id.* 8(d)(1), 9 MINN. STAT. at 770 (after filing formal charges Board shall schedule public hearing, date selected shall afford judge ample time to prepare for hearing but shall not be later than 30 days following receipt of judge's response). In "extraordinary circumstances," however, the Board may extend the hearing date. *Id.* 8(d)(2), 9 MINN. STAT. at 770. The rules do not define the term "extraordinary circumstances."

The judge and the Board are entitled to discovery to the extent available in civil or criminal proceedings, whichever is broader. *Id.* 8(d)(3), 9 MINN. STAT. at 770. The civil

The formal hearing, which is open to the public, is presided over by the entire Board, a three-member panel of the Board, or a referee.⁸³ The Board's attorney presents the matter to the presiding authority⁸⁴ and has the burden of proving the charges by clear and convincing evidence.⁸⁵ The judge or his counsel is allowed to present and cross-examine witnesses and introduce evidence.⁸⁶

Following the conclusion of the proceedings, the presiding authority makes findings and recommendations which, together with the record⁸⁷ and transcript of the testimony, are submitted to the entire Board.⁸⁸ The Board then promptly reviews the findings and conclusions and the record,⁸⁹ as well as any objections that may have been raised.⁹⁰ Following this review, the Board determines whether to recommend discipline of the judge.⁹¹ If a majority favors discipline, this recommendation,⁹² along with the record and findings, are filed with the Minnesota Supreme Court for final review.⁹³ Once the recommendation is filed, the matter is

rules are broader. Compare MINN. R. CIV. P. 26-37, 9 MINN. STAT. 202-18 (1980) with MINN. R. CRIM. P. 9, 21, 9 MINN. STAT. 52-56, 84-87 (1980).

83. MINN. R. BD. JUDICIAL STANDARDS 9(a)(1), 9 MINN. STAT. 765, 771 (1980). If the Board directs the hearing be before a referee appointed by the supreme court the Board must file a written request with the court. The supreme court appoints a referee within 10 days of receipt of this request. *Id.* 9(a)(2), 9 MINN. STAT. at 771. The person designated to preside at the hearing must be either a judge or a lawyer. *Id.* 9(a)(3), 9 MINN. STAT. at 771.

84. *Id.* 9(c)(1), 9 MINN. STAT. at 771. When a Board attorney presents evidence to members of the Board sitting as factfinders, there is a potential conflict of interest between these "prosecutorial" and "factfinding" roles that taints the fairness of the proceedings. *But see* notes 205-14 *infra* and accompanying text.

85. See MINN. R. BD. JUDICIAL STANDARDS 9(c)(2), 9 MINN. STAT. 765, 771 (1980).

86. *Id.* 9(c)(3), 9 MINN. STAT. at 771. All witnesses receive fees and expenses to the extent allowable in ordinary civil actions. Generally witnesses' expenses are borne by the party calling them. *Id.* 11(a)(1)-(2), 9 MINN. STAT. at 772.

87. Every formal hearing is recorded verbatim. *Id.* 9(c)(4), 9 MINN. STAT. at 771.

88. *Id.* 10(a), 9 MINN. STAT. at 771. These materials are also provided to the judge under investigation. *Id.* The attorneys for the Board and the judge may submit objections to the findings and recommendations. *Id.* 10(b), 9 MINN. STAT. at 771.

89. *Id.* 10(c), 9 MINN. STAT. at 771.

90. While the rules do not explicitly provide that the objections become part of the record, it can be inferred that because the objections are permitted under the rules, they become part of the record and are reviewed by the Board in making its recommendation.

91. See MINN. R. BD. JUDICIAL STANDARDS 10(e)(1), 9 MINN. STAT. 765, 771 (1980) (Board recommends discipline if majority of all members concur). In making its decision the Board may substitute its judgment for that of the factfinder. See *id.* 10(c), 9 MINN. STAT. at 771.

92. If there is a dissenting opinion it is transmitted to the supreme court along with the majority's decision. *Id.* 10(e)(3), 9 MINN. STAT. at 771.

93. See *id.* 12(a), 9 MINN. STAT. at 772. Proof of service must also be filed. *Id.*

The recommendation to the supreme court may be any of the following sanctions:

- (1) Removal;
- (2) Retirement;
- (3) Imposing discipline as an attorney;

docketed for expedited consideration⁹⁴ and the parties must file briefs with the Minnesota Supreme Court.⁹⁵

3. *Minnesota Supreme Court Review*

The supreme court then examines the record⁹⁶ of the earlier proceedings, and issues a written opinion detailing what disciplinary action, if any, it deems just and proper.⁹⁷ The court has full discretion in the matter—it may accept, reject or modify, in whole or in part, the recommendation of the Board.⁹⁸ When the court contemplates removal of a judge

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- (4) Imposing limitations or conditions on the performance of judicial duties;
 - (5) Reprimand or censure;
 - (6) Imposing a fine;
 - (7) Assessment of costs and expenses;
 - (8) Any combination of the above sanctions.

Id. 10(d), 9 MINN. STAT. at 771.

In the event a judge refuses to retire voluntarily, he may be involuntarily retired by the supreme court. If attempts to convince a judge to retire voluntarily fail, then the Board must file a formal complaint, hold a public hearing, make findings of fact, and present recommendations to the supreme court. *Id.* 14(a), 9 MINN. STAT. at 773.

A judge who is involuntarily retired is ineligible to perform judicial duties pending further order of the court and the court may indefinitely suspend him from the practice of law or transfer him to inactive status. *Id.* 14(b), 9 MINN. STAT. at 773.

94. *Id.* 12(b), 9 MINN. STAT. at 772.

95. *Id.* 12(c), 9 MINN. STAT. at 772.

96. If the court finds the record deficient in any respect, special procedures exist for supplementing the record or obtaining additional findings. The court may remand the matter to the Board, retaining jurisdiction, and stay the proceeding pending receipt of the Board's filing of the additional record. *See id.* 12(d)(1), 9 MINN. STAT. at 772. The court may order additional findings or oral argument on a particular issue on the entire record. *Id.* 12(d)(2), 9 MINN. STAT. at 772. The court without remand and prior to imposing discipline may accept or solicit supplementary filings provided the parties have notice and an opportunity to be heard. *Id.* 12(d)(3), 9 MINN. STAT. at 772.

97. *Id.* 12(f), 9 MINN. STAT. at 772. A charge filed against a member of the supreme court shall be heard and submitted to the court in the same manner as charges against other judges except that members of the supreme court may disqualify themselves under Minnesota Statutes section 2.724, subdivision 2. *See id.* 12(h), 9 MINN. STAT. at 773. Disqualified justices are replaced in the following manner: "Any number of justices may disqualify themselves from hearing and considering a case, in which event the supreme court may assign temporarily a retired justice of the supreme court or a district court judge to hear and consider the case in place of each disqualified justice." MINN. STAT. § 2.724(2) (1980).

The respondent may file a motion for rehearing depending upon the posture taken by the court. *Cf.* MINN. R. BD. JUDICIAL STANDARDS 12(i), 9 MINN. STAT. 765, 773 (1980) (supreme court may direct no motion for rehearing will be entertained, in which event its decision becomes final upon its filing). If the court does not prohibit a rehearing, respondent may present a rehearing motion within 15 days after filing of the decision. *See id.*

98. *See id.* 12(f), 9 MINN. STAT. at 772 (court shall direct "such disciplinary action as it finds just and proper, accepting, rejecting, or modifying in whole or in part, the recommendations of the board"). Furthermore, the supreme court has indicated "the grant of absolute power to remove from office implicitly gives us the power to impose lesser sanctions short of removal, in the absence of specific indication to the contrary by the legislature." *In re Anderson*, 312 Minn. 442, 448, 252 N.W.2d 592, 595 (1977).

from the bench, it also may determine that discipline of the judge as a lawyer may be warranted.⁹⁹ If a judge is to be removed, the court may provide the judge and the Lawyer's Professional Responsibility Board an opportunity to be heard on the issue of whether to discipline the judge as an attorney.¹⁰⁰

4. *Disciplinary Action by the Board*

From 1972 through 1980¹⁰¹ the Board has received 503 complaints.¹⁰² The sources of the complaints include litigants, attorneys, law enforcement officials, judges, and other third parties.¹⁰³ The complaints have ranged from poor judicial temperament, to alcoholism, to practicing law while on the bench.¹⁰⁴ The complaints investigated and closed by the Board in 1978, 1979, and 1980 concerned the following:¹⁰⁵

Dissatisfaction with Decision	64
Personal Behavior	33
Slow in Orders	31
Procedural or Administrative	
Irregularity	31
Bias or Prejudice	23
Conflict of Interest	8
Attorney Misconduct—Prior to	
Becoming a Judge	7

99. *See* MINN. R. BD. JUDICIAL STANDARDS 12(g), 9 MINN. STAT. 765, 772 (1980).

100. *See id.* ("If removal of a judge is deemed appropriate by the court, it shall notify the judge and the Lawyers Professional Responsibility Board and give them an opportunity to be heard on the issue of the lawyers [*sic*] discipline, if any, to be imposed.")

101. The executive secretary is required by the rules to prepare an annual report of the Board's activities that may be made public by a majority vote of the Board. *See id.* 1(e)(10), 9 MINN. STAT. at 776 (duty of executive secretary to prepare annual report of Board activities); *id.* 1(h), 9 MINN. STAT. at 767 (copies of annual report may be made available by majority vote of full Board). There are no reports for 1972 and 1973.

102. *See* MINNESOTA BOARD ON JUDICIAL STANDARDS, ANNUAL REPORT: MINNESOTA BOARD ON JUDICIAL STANDARDS FOR THE CALENDAR YEAR 1980, at 3-4 (Apr. 2, 1981) (number of complaints received were 4 in 1972, 35 in 1973, 54 in 1974, 41 in 1975, 53 in 1976, 73 in 1977, 71 in 1978, 85 in 1979, and 83 in 1980) [hereinafter cited as ANNUAL REPORT FOR 1980] (on file at William Mitchell Law Review office).

103. *See* MINNESOTA BOARD ON JUDICIAL STANDARDS, ANNUAL REPORT: MINNESOTA BOARD ON JUDICIAL STANDARDS FOR THE CALENDAR YEAR 1977, at 3 (Apr. 12, 1978) [hereinafter cited as ANNUAL REPORT FOR 1977] (on file at William Mitchell Law Review office).

104. *See id.* at 4.

105. *See* ANNUAL REPORT FOR 1980, *supra* note 102, at 4 (87 closed in 1980); MINNESOTA BOARD ON JUDICIAL STANDARDS, ANNUAL REPORT: MINNESOTA BOARD ON JUDICIAL STANDARDS FOR THE CALENDAR YEAR 1979, at 4 (Apr. 10, 1980) (70 closed in 1979) [hereinafter cited as ANNUAL REPORT FOR 1979] (on file at William Mitchell Law Review office); MINNESOTA BOARD ON JUDICIAL STANDARDS, ANNUAL REPORT: MINNESOTA BOARD ON JUDICIAL STANDARDS FOR THE CALENDAR YEAR 1978, at 4-5 (Mar. 5, 1979) (89 closed in 1978) [hereinafter cited as ANNUAL REPORT FOR 1978] (on file at William Mitchell Law Review office).

Physical or Mental Disability.....	4
Intemperence.....	2
Practicing Law While a Judge	2
Failure to Perform — Neglect	1

Two hundred and forty-six complaints were investigated and closed by the Board in these three years.¹⁰⁶ The Board's determination were as follows:¹⁰⁷

Unfounded or Frivolous.....	84
Matter for Appellate Process	65
Judge Corrected Problems	46
Private Reprimand, Admonition, Warning	32
Lack of Jurisdiction	6
Judge Being Monitored	4
Disciplinary Recommendation to Supreme Court	3
Other.....	3
Judge Retired	1
Public Censure	1
Retired Judge — not to hear cases.....	1

The Board's effectiveness as a disciplinary system is exemplified by the number of complaints it has received. While many complaints are dismissed as unfounded or frivolous, many others have resulted in discipline or admonishment of judges.¹⁰⁸ The Board has taken positive steps to improve the judiciary.¹⁰⁹ In fact, more judges have been formally disciplined since the Board's creation in 1971 than there had been in Minne-

106. See ANNUAL REPORT FOR 1980, *supra* note 102, at 5; ANNUAL REPORT FOR 1979, *supra* note 105, at 5; ANNUAL REPORT FOR 1978, *supra* note 105, at 5.

107. See ANNUAL REPORT FOR 1980, *supra* note 102, at 5; ANNUAL REPORT FOR 1979, *supra* note 105, at 5; ANNUAL REPORT FOR 1978, *supra* note 105, at 5.

During 1980, for example, the Board conducted 23 inquiries and 20 investigations. Thirty-seven judges were requested to respond in writing to the Board for explanation of their alleged misconduct. Eight judges appeared before the Board to explain their conduct. The 20 investigations concerned the following allegations:

Slow In Orders	5
Prejudice & Bias.....	3
Courtroom Demeanor.....	3
Procedural or Administrative Irregularity	4
Personal Conduct.....	2
Practice of Law	2
Attorney Misconduct.....	1
Total	20

ANNUAL REPORT FOR 1980, *supra* note 102, at 5.

108. See note 107 *supra* and accompanying text.

109. Cf. ANNUAL REPORT FOR 1979, *supra* note 105, at 8 (Board believes its work is fostering improvement in judicial conduct; Board continues to counsel with judges and public over procedures and actions of court); note 110 *infra* (a number of judges have been disciplined).

sota's history prior to that time.¹¹⁰

The efforts of the Board on Judicial Standards have not gone unchallenged. In two recent cases, the Minnesota Supreme Court has been faced with the question of whether formal judicial disciplinary proceedings violate the constitutional rights of the judges under investigation.¹¹¹ These decisions for the most part have held that judicial disciplinary proceedings do not violate due process and protect an individual's fundamental constitutional rights.¹¹²

IV. CONSTITUTIONALITY OF MINNESOTA'S JUDICIAL DISCIPLINARY PROCEEDINGS

The first case to address the constitutionality of judicial disciplinary proceedings in Minnesota was *In re Gillard*.¹¹³ The *Gillard* matter had been before the court previously,¹¹⁴ when Gillard had been under investigation by the Lawyers Professional Responsibility Board (LPRB) for conduct prior to his appointment to the bench.¹¹⁵ Based on its investigation and the hearing that followed, the LPRB recommended to the supreme court that Judge Gillard be disbarred from the practice of law.¹¹⁶ The Board on Judicial Standards took the position that if Judge

110. Six judges have been formally disciplined by the supreme court upon the recommendation of the Board on Judicial Standards. See note 55 *supra*.

111. See *In re McDonough*, 296 N.W.2d 648 (Minn. 1979), *modified*, 296 N.W.2d 699 (Minn. 1980); *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (per curiam).

Minnesota is not the only state that has been faced with this kind of challenge. See, e.g., *In re Hanson*, 532 P.2d 303 (Alaska 1975); *In re Rome*, 218 Kan. 198, 542 P.2d 767 (1975) (per curiam); *In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970); *In re Mikesell*, 396 Mich. 517, 243 N.W.2d 86 (1976) (per curiam).

112. Cf. *In re McDonough*, 296 N.W.2d 648, 691 (Minn. 1979) ("Because the supreme court's independent judgment is involved here, we are somewhat less concerned about the possible biases and procedural shortcomings below. . . . The obvious difficulties with institutional inertia in a proceeding of this type are of concern, and we express our confidence that with additional experience the Board will act to minimize them"), *modified*, 296 N.W.2d 699 (Minn. 1980); *In re Gillard*, 271 N.W.2d 785, 808-09 (Minn. 1978) (per curiam) ("Judged by these standards, we find no constitutional infirmity in the procedure here employed. . . . The statutory standard [of Code of Judicial Conduct] is not fatally vague or overbroad.").

113. 271 N.W.2d 785 (Minn. 1978) (per curiam).

114. See *In re Gillard*, 260 N.W.2d 562 (Minn. 1977) (per curiam).

115. See *id.* at 563. The conduct under investigation occurred prior to the judge's appointment to the bench and included allegations of implying to a client that payment of a fee was necessary to influence the granting of an insurance license, failing to provide adequate representation of clients, and representing clients when a potential conflict of interest existed. See *id.*

116. See *id.*

The respondent argued the Lawyers Professional Responsibility Board (LPRB) was without jurisdiction or authority to discipline a district judge because this power was reserved exclusively to the legislature by the Minnesota Constitution. See Respondent's Brief at 47. The court had previously denied "respondent's petition for a writ of prohibition against the LPRB proceeding because he had 'failed to sustain his burden of demon-

Gillard was disbarred as an attorney, he should be removed from judicial office without the necessity of formal proceedings before the Board.¹¹⁷

The court rejected this argument and held that because Judge Gillard was not afforded a hearing before the Board on Judicial Standards on the question of his fitness to retain judicial office, he had not received adequate notice or an opportunity to be heard on the question.¹¹⁸ The court ordered the matter stayed until the Board had conducted a full investigation and hearing, including consideration of the allegations that Judge Gillard had engaged in misconduct prior to his appointment to the bench.¹¹⁹ The Board was requested to "make whatever findings and recommendation to this court" it deemed appropriate.¹²⁰

Following the supreme court's order the Board conducted a hearing regarding the charges against Judge Gillard.¹²¹ After the hearing, the Board filed its findings of fact and conclusions with the court, and recommended that Judge Gillard be removed from office.¹²² In his brief to the

strating lack of jurisdiction on the part of [the LPRB].'" 260 N.W.2d at 563. The court never addressed the above question and it was in effect mooted by the court's decision to stay the matter pending an independent investigation by the Board on Judicial Standards.

The judge made much the same argument in the second case regarding the constitutional authority of the Board on Judicial Standards and the supreme court to investigate and discipline judges. See Respondent's Brief at 15-21, *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (per curiam). The court rejected this contention. For a discussion of the court's reasoning, see notes 125-32 *infra* and accompanying text.

117. See 260 N.W.2d at 563. The Board on Judicial Standards argued:

[T]his court has the inherent power to declare as a matter of law that the position of Judge Gillard as a Judge of the District Court of Freeborn County is vacant by virtue of the fact that said person no longer possesses the constitutional qualifications to hold office.

Neither the statutes relating to the Board on Judicial Standards nor the Rules of the Board provide specifically with reference to the somewhat unique situation of the disbarment of a sitting Judge.

Arguably, the conduct found to have occurred by Judge Fosseen [the referee at the LPRB hearing], if sustained by this Court, would fall within the portion of Sec. 490.16, Subd. 3, which provides for removal based upon action which "... may constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

Brief of Minnesota Board on Judicial Standards at 7-8, 9-10.

118. See 260 N.W.2d at 563. The Michigan Supreme Court has taken the same position. See, e.g., *In re Moes*, 389 Mich. 258, 205 N.W.2d 428 (1973); *In re Kapcia*, 389 Mich. 306, 205 N.W.2d 436 (1973).

119. See 260 N.W.2d at 563. In a footnote the court indicated:

In finding that the Board on Judicial Standards has authority to scrutinize allegations of misconduct which occurred prior to elevation to judicial office, we adopt a position consistent with the broad language of Minn.St. 490.16, subd. 3, and consistent with the better-reasoned opinions of other jurisdictions construing similar statutes.

Id. at 564 n.2 (citations omitted).

120. See *id.*

121. See Petitioner's Brief at 2-5, *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (per curiam). Briefs were filed by both sides at this hearing. See *id.* at 4.

122. See *id.* at 5.

court, the judge raised a number of constitutional challenges to the proceedings.¹²³

Essentially, Judge Gillard (respondent) raised five challenges to the proceedings. The court addressed each argument and found that none of the objections were valid.¹²⁴ Respondent first argued that Minnesota Statutes section 490.16, subdivision 3, which provides the Board on Judicial Standards with authority to recommend discipline of a judge to the supreme court, was an unconstitutional delegation of power.¹²⁵ Respondent argued that the power to remove a judge was a legislative function that could not be delegated.¹²⁶ In response to this argument the court

123. See notes 125-49 *infra* and accompanying text.

124. See *id.*

125. See 271 N.W.2d at 806; Respondent's Brief at 15-30.

Respondent Gillard argued that the court could not be involved in the process of judicial discipline because the Minnesota Constitution delegated this power to the legislature. See *id.* at 15-18. In support of this argument, respondent relied on the Commentary to section 1.3 of the ABA Standards Relating to Discipline and Disability Retirement. See *id.* at 29. The Commentary states "[w]hile the court has the inherent power to discipline judges . . . it lacks the inherent power to remove them from office." STANDARDS RELATING TO JUDICIAL DISCIPLINE, *supra* note 57, § 1.3, Commentary, at 5. The relevant Minnesota statute provides in part:

On recommendation of the board on judicial standards, the supreme court may . . . censure or remove a judge for action or inaction that may constitute persistent failure to perform his duties, incompetence in performing his duties, habitual intemperance or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

MINN. STAT. § 490.16(3) (1980). The Minnesota Constitution states one branch of government may not exercise any powers belonging to another branch unless expressly provided for in the constitution. See MINN. CONST. art. III, § 1.

126. See 271 N.W.2d at 806. In support of his argument respondent relied on article six, section nine of the Minnesota Constitution. See *id.* This provision states in part: "The legislature may also provide for the retirement, removal or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice." MINN. CONST. art. VI, § 9.

Alternatively, the respondent argued that if the power to remove judges was delegable it could not be delegated to another branch of government. See 271 N.W.2d at 806. In support of this argument respondent relied on *State ex rel. Thompson v. Day*, 200 Minn. 77, 273 N.W. 684 (1937). See Respondent's Brief at 22. *Day* involved the constitutionality of the Governor's removal of one judge from a case and, pursuant to statutory authority, appointing another judge from another judicial district to try the matter. See *State ex rel. Thompson v. Day*, 200 Minn. 77, 80, 273 N.W. 684, 685 (1937). The Minnesota Constitution, in article six, section five, permitted the legislature to provide by law that a judge of one judicial district may discharge the duties of a judge of another district when convenience or public interest necessitated this action. See *id.* In *Day* the court held the full power "under section 5, article 6, could be exercised by the Legislature without calling in the executive. . . . [To construe the section otherwise] would be in derogation of the provisions of article 3, section 1, which are fundamental to the preservation of a free democracy." See *id.* at 81, 273 N.W. at 686. The *Gillard* court found this case to be inapplicable: "[*Day*] only precludes legislative delegation of judicial power to the executive. It says nothing about the legality of legislative delegation of judicial power to the judiciary." 271 N.W.2d at 806.

cited several cases that upheld a delegation of quasi-judicial or judicial authority by the legislature to the judiciary.¹²⁷

In particular, the court found *State ex rel. Clapp v. Peterson*¹²⁸ insightful.¹²⁹ In *Peterson* the Minnesota Supreme Court held that a statute allowing the Governor to remove county treasurers for nonfeasance or malfeasance was not an improper delegation of the legislature's constitutional power to provide for the removal of county treasurers and other inferior officers of the state.¹³⁰ The *Gillard* court noted that the constitutional provision involved in *Peterson* had a direct counterpart in article 6, section 9 of the Minnesota Constitution which allows the legislature to provide for the removal of judges.¹³¹ Therefore, the *Gillard* court had little trouble upholding the constitutionality of the statute based on *Peterson*.¹³²

Respondent's second contention was that the Board's recommendation

127. See 271 N.W.2d at 806-07.

For a discussion of other cases involving the delegation of legislative duties to the court, see, e.g., *Thorland v. Independent Consol. School Dist. No. 44*, 246 Minn. 96, 74 N.W.2d 410 (1956); *Barmel v. Minneapolis-St. Paul Sanitary Dist.*, 201 Minn. 622, 277 N.W. 208 (1938); *City of Duluth v. Railroad & Warehouse Comm'n*, 167 Minn. 311, 209 N.W. 10 (1926).

128. 50 Minn. 239, 52 N.W. 655 (1892).

129. See notes 130-33 *infra* and accompanying text.

130. See 50 Minn. at 244, 52 N.W. at 655. The constitutional provision in question read as follows: "The legislature of this state may provide for the removal of inferior officers from office, for malfeasance or nonfeasance in the performance of their duties." MINN. CONST. of 1857, art. XIII, § 2 (current version at MINN. CONST. art. VIII, § 5). Pursuant to its constitutional authority, the legislature enacted a statute that allowed the Governor to remove a county treasurer for malfeasance or nonfeasance in office. See *State ex rel. Clapp v. Peterson*, 50 Minn. 239, 243-44, 52 N.W. 655, 655 (1892).

The respondent in *Peterson* argued "that the power of removal from office is judicial in its nature, . . . and that, under the constitution, the legislature has no authority to provide for the removal of a county treasurer except by judicial proceedings in court." See *id.* at 243, 52 N.W. at 655.

131. The court stated that "[p]ursuant to art. 13, § 2, presently found in Minn. Const. 1974, art. 8, § 5, the legislature passed a statute permitting the governor to remove county treasurers. This statute had the same constitutional basis as Minn.St. 490.15 to 490.18." 271 N.W.2d at 807.

In his brief the respondent argued that "[t]he people of Minnesota in article 6, section 9, empowered the legislature to create a less cumbersome alternative to impeachment, but this provision does not allow the legislature to transfer that function (as it has sought to do) to the judicial branch." Respondent's Brief at 28. Respondent also asserted that the appearance of bias or actions intended to avoid bias would be obviated if a legislative agency disciplined judges. See *id.*

132. See 271 N.W.2d at 807. The *Peterson* court ruled that the statute in question was not an improper constitutional delegation of power. See 50 Minn. at 244, 52 N.W. at 655. Collateral support for respondent's argument, however, is found in the Commentary to the ABA Standards that relate to judicial discipline. The Commentary states the inherent power of a court "includes the authority to discipline judges independent of any express constitutional grant. . . . [I]nherent power does not include the power to remove." STANDARDS RELATING TO JUDICIAL DISCIPLINE, *supra* note 57, § 1.1, Commentary, at 3.

of disbarment was based in part on violations that were not specified in the petition for disbarment and thus constituted a violation of his due process rights.¹³³ The court stated that in disciplinary proceedings due process requires that the charges be sufficiently clear and specific to allow the respondent to develop his defense.¹³⁴ The court held that the procedures employed were not unconstitutional and noted "most of respondent's objections concern a failure to allege violations of precise disciplinary rules."¹³⁵

133. See Respondent's Brief at 61-67, *In re Gillard*, 260 N.W.2d 562 (Minn. 1977) (per curiam). The respondent relied on *In re Ruffalo*, 390 U.S. 544 (1968), in support of his argument. See Respondent's Brief at 63, 65, 67 (argument was raised but not dealt with in first proceeding; apparently court believed issue was before it, even though respondent did not reiterate argument in second proceeding).

In *Ruffalo*, the United States Supreme Court held petitioner's due process rights were violated when an additional charge of misconduct was added after petitioner and one of his employees had testified "at length on all the material facts pertaining to this phase of the case." 390 U.S. at 550-51. "This absence of fair notice [to Ruffalo] as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." See *id.* at 552.

The *Gillard* court noted, however, that subsequent decisions have failed to extend the notice requirements of *Ruffalo*. See 271 N.W.2d at 808. The court also noted that the due process standards delineated in *In re Rerat*, 224 Minn. 124, 28 N.W.2d 168 (1947), were consistent with the requirement of *Ruffalo*. See 271 N.W.2d at 808.

134. See 271 N.W.2d at 808 (quoting *In re Rerat*, 224 Minn. 124, 128-29, 28 N.W.2d 168, 172-73 (1947)). *Rerat* states that in a disciplinary proceeding:

[I]t is essential that the requirements of due process of law be observed, and to this end the charges of professional misconduct, though informal, should be sufficiently clear and specific, in light of the circumstances of each case, to afford the respondent an opportunity to anticipate, prepare and present his defense.

224 Minn. at 128-29, 28 N.W.2d at 172-73.

135. See 271 N.W.2d at 808. The court also indicated that "[a]t most, collateral findings of Complaints III (misrepresentations to adverse counsel and the ethics committee), X (signing for others), and XI (falsely notarizing) involve misconduct not generally alleged in the petitions." See *id.*

At first glance this appears to be both a cursory treatment of respondent's argument and inconsistent with the *Ruffalo* decision. A review of the record and an examination of the cases cited by the court to the effect that *Ruffalo* is not extended in disbarment proceedings, however, provide support for the court's finding above.

The initial petition contained the following allegations against Judge Gillard: That the files of prior complaints against Respondent demonstrate that Respondent has engaged in a pattern of behavior and a course of conduct, as hereinafter more specifically set forth, demonstrating misrepresentation to his clients, failure to make proper communication with his clients, repeated dilatory conduct in handling of his clients' matters, neglecting his clients' affairs, and failure to fully cooperate with the District Ethics Committee.

Petitioner's Brief at 11, *In re Gillard*, 260 N.W.2d 562 (Minn. 1977) (per curiam) (Brief for LPRB). The supplementary petition provided in part: "That the foregoing and other complaints reveal that Respondent has failed to maintain proper control over legal matters entrusted to him, and that Respondent's neglect has prejudiced and resulted in losses to numerous clients." *Id.* at 12.

In its brief, the LPRB noted that unlike in *Ruffalo* no new charges were added against the respondent during the course of the proceeding. See *id.* at 11. Additionally, all of the

The third constitutional issue addressed by the court was whether the standards of judicial conduct prescribed by article 6, section 9 of the Minnesota Constitution, and section 490.16 of Minnesota Statutes are unconstitutionally vague and overbroad.¹³⁶ Other jurisdictions have

issues raised and tried at the hearing arose out of the allegations contained in either the original or supplementary petition. *See id.* Further, during the entire proceeding respondent's counsel made no objection that the hearing was beyond the scope of the pleadings. *See id.* at 13. Additionally, respondent's counsel apparently "obtained copies of virtually every document, witness statement, and investigative report in Petitioner's files which in any fashion related to the allegations of unprofessional conduct brought against Respondent." *See id.* at 12.

Several recent decisions support the court's position. In *In re Kunkle*, 88 S.D. 269, 218 N.W.2d 521 (1974), the South Dakota court opined:

Although the complaint in the instant case could very well have been made more specific with regard to respondent's alleged misconduct, we hold that it adequately informed respondent of the nature of the charge against him . . .

. . . When viewed in the light of the knowledge that respondent and his attorneys gleaned from studying the probate file and from examining the report of the grievance committee and the various papers filed in connection therewith, we cannot say that respondent was misled or in any way prejudiced by the lack of specificity in the complaint. Certainly respondent was not misled or prejudiced in his defense to the charges in the manner in which the petitioners may have been misled and prejudiced in the *Ruffalo* case, . . . inasmuch as respondent did not testify or in any other manner take a position that was later used as the basis of another charge against him.

See id. at 274-75, 218 N.W.2d at 524-25. In *Javits v. Stevens*, 382 F. Supp. 131 (S.D.N.Y. 1974), a lawyer disciplinary case, the court stated much the same thing:

[D]ue process is a flexible concept, and its requirements vary with the type of proceeding involved. . . . All that is required is that it [the petition] be sufficient to inform the . . . [person] of the nature and substance of the charges against him and permit him to answer them.

The facts here are simply not comparable to *Ruffalo*. The nature of the charge of misconduct against Javits did not change in the middle of the proceedings, as in *Ruffalo*, thus introducing into the case elements of unfair surprise and entrapment totally lacking here.

See id. at 138-39 (footnotes omitted). As these cases indicate, and as the *Gillard* court held, it is not constitutionally necessary to allege specific violations of particular disciplinary rules.

136. *See* 271 N.W.2d at 809; Respondent's Brief at 31.

Arguing that an independent judiciary is no less essential than freedom of speech, the respondent contended that such phrases as "conduct prejudicial to the administration of justice" and "seriously deprecates public confidence in the integrity of the Respondent" are hopelessly vague and seriously impair the notion of an independent judiciary. *See id.* at 32-34. Respondent further argued it was particularly egregious when the judge is under investigation for conduct that presumed deprecates public confidence in the judiciary when these acts were committed prior to becoming a judge. *See id.* at 33. Respondent also believed that if these standards were held to be constitutional there would be far-reaching ramifications. "If these proceedings should result in Judge Gillard's removal . . . good lawyers asked to serve on the bench should take careful stock . . . [of] what they may be

uniformly rejected similar challenges.¹³⁷ The general statutory and constitutional provisions authorizing discipline of judges for misconduct incorporate the more specific rules of the Code on Professional Responsibility and Code of Judicial Conduct.¹³⁸ Although the court recognized that even these more specific provisions cannot enumerate all the possible grounds for removal and that they merely serve as guidelines,¹³⁹ the standards were held not to be "fatally vague or overbroad."¹⁴⁰

In the decision concerning Judge Gillard's conduct prior to becoming

destroyed for having done—prospectively, clairvoyantly—to deprecate the bench before they got there." *Id.* at 38-39.

The constitutional prohibitions of vague or overbroad laws have been described as follows:

As a matter of due process, a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork. This indefiniteness runs afoul of due process concepts which require that persons be given fair notice of what to avoid

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-28, at 718 (1978) (footnotes omitted).

The rule against overbreadth demands that the regulation be framed to cover only that conduct which is constitutionally subject to control, and not embrace conduct protected under the First Amendment or conduct that might be protected but which it is not necessary to control in order to achieve the desired objective. Failure to meet either of these requirements means that the regulation is void on its face, regardless of the validity of particular applications.

T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 364-65 (1970).

137. *See, e.g.*, Halleck v. Berliner, 427 F. Supp. 1225 (D.D.C. 1977); Keiser v. Bell, 332 F. Supp. 608 (E.D. Pa. 1971); Napolitano v. Ward, 317 F. Supp. 79 (N.D. Ill. 1970); Sarisoehn v. Appellate Div., Second Dep't, 265 F. Supp. 455 (E.D.N.Y. 1967); McComb v. Commission on Judicial Performance, 19 Cal. 3d Spec. Trib. Supp. 1, 564 P.2d 1, 138 Cal. Rptr. 459 (1977); Nicholson v. Judicial Retirement & Removal Comm'n, 562 S.W.2d 306 (Ky. 1978) (per curiam); *In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970); *In re Foster*, 271 Md. 449, 318 A.2d 253 (1974); Friedman v. State, 24 N.Y.2d 528, 249 N.E.2d 369, 301 N.Y.S.2d 484 (1969), *appeal dismissed*, 397 U.S. 317 (1970); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

138. *See In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978) (per curiam). The incorporation of the Rules on Judicial Standards is provided for in the statute. *See* MINN. STAT. § 490.16(5) (1980). The Minnesota Constitution generally provides that a judge may be disciplined or removed for incompetency or conduct prejudicial to the administration of justice. *See* MINN. CONST. art. VI, § 9. The statute essentially provides the same thing. *See* MINN. STAT. § 490.16(3) (1980).

139. *See* 271 N.W.2d at 809 (quoting Sarisoehn v. Appellate Div., Second Dep't, 265 F. Supp. 455, 458 (E.D.N.Y. 1967)). As the court indicated in a footnote, the constitutionality of broad standards regulating the professional conduct of lawyers has long been upheld. *See* 271 N.W.2d at 809 n.7 (quoting *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 14 (1857)). The *Secombe* Court stated:

[I]t is difficult, if not impossible to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed. And the Legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice as cases may arise.

Ex Parte Secombe, 60 U.S. (19 How.) 9, 14 (1857).

140. *See* 271 N.W.2d at 809. In his brief respondent alleged:

a judge, the court indicated the referee's findings in the first hearing by the LPRB were not subject to collateral attack by Judge Gillard during subsequent hearings by the Board on Judicial Standards.¹⁴¹

The fourth constitutional claim of the respondent was that his due process rights were denied as a result of this limitation.¹⁴² According to the *Gillard* court, further review of the evidence was not necessary and

Analogous to the protection of speech, and probably no less essential to the health of a democratic government, is the preservation of an independent judiciary. It cannot be doubted that the tripartite system of separate powers and checks and balances can function effectively only so long as the judge of every bench can act without fear of the consequences of his conscientious decisions, (and, we might add, without fear that a critical scrutiny of his every action before becoming a judge may lead to accusations of remote improprieties unrelated to his *present* fitness to judge).

Respondent's Brief at 31-32 (emphasis in original). In an apparent response to this contention the court pointed out that

[t]he conduct complained of has nothing to do with conscientious, but unpopular, opinions or ex post facto definitions of unethical behavior. The misconduct alleged includes persistent misrepresentations, dilatoriness, and bribery solicitation. Imposition of disciplinary sanctions for such conduct hardly threatens the legitimate scope of judicial autonomy and independence.

271 N.W.2d at 809.

141. See *In re Gillard*, 260 N.W.2d 562, 564 (Minn. 1977) (per curiam). The Board in the Findings and Conclusions of its recommendation of disbarment in the second proceeding indicated that pursuant to the supreme court's earlier decision it did not make a full and independent examination of the record of the proceedings before the referee. Instead, it accepted the supreme court's determination that the referee's findings were amply supported by the record. See Petitioner's Appendix at 18, *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (per curiam).

142. See 271 N.W.2d at 810. Respondent found support for this argument in the court's earlier decision to remand the case to the Board in which the court said "[t]he Board shall afford respondent all rights to which he is entitled." See Respondent's Brief at 40 (emphasis in original) (quoting *In re Gillard*, 260 N.W.2d 562, 564 (Minn. 1977) (per curiam)). Respondent alleged the Board had failed to make a full and independent review of the evidence and had merely rubber stamped the referee's earlier findings. See Respondent's Brief at 41.

The Board in its brief argued that it was not required to make a full and independent examination of all the transcripts and exhibits of the proceedings before Referee Fosseen. See Petitioner's Brief at 57. The Board argued it was not required to act and the supreme court in its initial decision merely requested the Board to act. See *id.* at 58.

The Board's counsel seemed to question the respondent's motivation in raising this issue:

[N]either counsel for Respondent nor Respondent, both of whom were present, objected to [the] . . . statement [that the Board did not have to examine in detail, all the evidence contained in all 11 volumes of the record] at the Hearing. Nor did they allege or argue at any time during the course of the proceedings before the Board . . . that it was the responsibility of the individual members of this Board to re-read all of the testimony and exhibits . . .

See *id.* at 60. The Board indicated that there was no necessity to review the entire record when the court found that the findings and conclusions of Referee Fosseen were amply supported by the evidence. See *id.* at 62. Finally, the Board argued that it was not simply accepting the conclusions of another body, rather it was the Board responding to a determination of the court that the referee's conclusions were amply supported by the evidence and not subject to collateral attack. See *id.* at 65.

would have served little purpose because the court had previously reviewed the evidence and found the referee's findings to be amply supported.¹⁴³ The only question before the Board was whether discipline or removal was warranted, given the misconduct.¹⁴⁴ In the court's view, the demonstrated instances of wrongdoing clearly warranted discipline.¹⁴⁵

The final constitutional issue considered by the court involved various due process challenges to the Board's proceedings.¹⁴⁶ Noting that due process requirements depend upon the nature of the proceeding, the court stated the due process requirements of a criminal proceeding were not applicable because judicial disciplinary proceedings are *sui generis*.¹⁴⁷ Only general due process rights of a fair and regular proceeding attach.¹⁴⁸ The court found that none of the challenges to the proceedings violated the due process rights of the respondent.¹⁴⁹

143. See 271 N.W.2d at 810. "[P]roceedings before the Judicial Board and the LPRB both anticipate that review by the Supreme Court shall be both final and independent of the findings and conclusions of the Judicial Board." *Id.* This independent review would apparently remedy any due process defects.

144. See *id.*

In an effort to mitigate the charge of solicitation of bribery the respondent offered to introduce at the Board's hearing the deposition of an acquaintance. See *id.* The Board reviewed the deposition but refused to admit it, indicating that this would constitute a collateral attack on the referee's findings. See *id.* It did, however, hold that this testimony if admitted would not alter its findings. See *id.*

Respondent challenged the Board's recommendation because it failed to take the deposition into account. See *id.* at 811. The court responded that this "error" could be corrected on review. "Moreover, the Judicial Board's own findings and conclusions clearly take into account the proffered evidence in alternative findings and bases for the removal recommendation. Thus, remanding for further Judicial Board hearings is unnecessary." *Id.* After reviewing the deposition, the court concluded that this evidence merely corroborated respondent's claim of ignorance with the insurance licensing process (out of which the solicitation of bribery accusation arose). See *id.* The evidence did not disturb the finding that improper payoffs were suggested. See *id.*

145. See *id.* The court noted

there is no new challenge to remaining complaints of misconduct, characterized in the previous opinion as "a pattern of dilatory handling of clients' affairs to their prejudice; falsely executing and notarizing affidavits; and deceiving clients as to the status of their professional retainers." The Judicial Board found that such misconduct was grounds for removal wholly aside from the misconduct alleged in Complaint I.

Id. (citation omitted).

146. See *id.* The challenges concerned the presence of a quorum, the use of Judge Gillard's name in the caption of the proceeding, and the failure of the Board to refer the matter to a referee. See *id.* For a discussion of the court's response to these challenges, see note 149 *infra*.

147. See 271 N.W.2d at 812 (proceedings are *sui generis*, designed to protect citizenry by insuring integrity of judges).

148. See *id.*; note 134 *supra* and accompanying text.

149. See 271 N.W.2d at 812-13. The respondent argued that because the terms of two of the members had expired, they should have been disqualified from participating in the proceedings. Disqualification of these two members would have resulted in there not be-

The Minnesota court was again confronted with legal challenges to the proceedings of the Board in *In re McDonough*.¹⁵⁰ After several complaints

ing a valid quorum under the Board's rules. *See* Respondent's Brief at 51-53. The court indicated, however, that there was a specific statutory provision that allowed Board members to serve until their successors were appointed. *See* 271 N.W.2d at 812. Minnesota Statutes section 490.15, subdivision 2 provides that the "filling of vacancies on the board shall be as provided in section 15.0575." *See* MINN. STAT. § 490.15(2) (1980). Minnesota Statutes section 15.0575 provides that "[m]embers may serve until their successors are appointed and qualify." MINN. STAT. § 15.0575(2) (1980). Thus, the respondent's argument was without merit. *See* 271 N.W.2d at 812. The court further opined that because it conducts an independent review "the absence of a quorum should not be fatal, particularly where there were six members [quorum under the rules in force at the time consisted of five members] of the board, . . . who acted unanimously on the *Gillard* matter" at the two meetings. *See id.* at 813.

The second challenge to the regularity of the proceedings was that the use of the respondent's name in the caption of the complaint was a violation of the Board's rules. *See* Respondent's Brief at 54-55. While technically a violation of the rules, the court recognized that due to the unusual procedural history of the case the charges against Judge *Gillard* had been revealed in their earlier opinion. "[U]nder the circumstances of this case, where there was little confidentiality to protect, noncompliance does not so offend fundamental fairness as to void the proceedings." 271 N.W.2d at 813. The court, however, firmly stated "[i]n the future, more scrupulous compliance with the rules is directed" *See id.*

The third claim regarding the proceedings was that the failure of the Board to refer the matter to a referee constituted an arbitrary and capricious exercise of discretion. *See* Respondent's Brief at 56. The court found "no error in the decision . . . that the importance of the matter warranted . . . [the Board's] exclusive involvement. . . . Efficiency and economy clearly supported the decision to bypass additional review of an essentially legal question." 271 N.W.2d at 813.

Interestingly, even if the proceedings were violative of the Board's rules, the court could have considered the matter anyway. *See id.* In support of this position the court cited *In re Wireman*, 367 N.E.2d 1368 (Ind. 1977) (per curiam), *cert. denied*, 436 U.S. 904 (1978), *cert. denied*, 446 U.S. 906 (1980). *See* 271 N.W.2d at 814. The attorney who was disciplined in *Wireman* sought to have the proceeding dismissed because he was not afforded a hearing within 60 days as required under Indiana's Disciplinary Rules. *See In re Wireman*, 367 N.E.2d 1368, 1370 (Ind. 1977) (per curiam), *cert. denied*, 436 U.S. 904 (1978), *cert. denied*, 446 U.S. 908 (1980). The court disagreed noting that beyond general due process requirements of notice and an opportunity to be heard "there is no authority to suggest that the expiration of a time period would establish a constitutional infirmity mandating dismissal of all charges." *See id.*

150. 296 N.W.2d 648 (Minn. 1979), *modified*, 296 N.W.2d 699 (Minn. 1980).

Judge McDonough, interestingly enough, was involved in an earlier judicial disciplinary proceeding. In *In re Bartholet*, 293 Minn. 495, 198 N.W.2d 152 (1972) (per curiam), Judge McDonough had been appointed by Judge Bartholet to appraise an estate that was before Judge Bartholet in a probate proceeding. Judge McDonough received \$6,600 for his work as an appraiser which amounted to nothing more than "a brief and apparently general conversation with representatives of the corporate executor, [after which Judge McDonough] . . . signed the appraisal submitted to [him] . . . by the executor." *See id.* at 498, 198 N.W.2d at 154. Soon afterward, Judge McDonough contributed \$1,800 to Judge Bartholet's reelection campaign. *See id.* at 498-99, 198 N.W.2d at 154.

Judge McDonough indicated that he contributed to Judge Bartholet's campaign because when he had been hospitalized for back surgery, Judge Bartholet had agreed to serve as his substitute in Washington County Probate Court. *See id.* at 499, 195 N.W.2d at

regarding Judge McDonough's conduct on the bench, an investigation by the Board was commenced.¹⁵¹ Formal proceedings followed. The referee at the disciplinary hearing found that Judge McDonough had acted improperly.¹⁵² After review of the referee's report, the Board recommended to the supreme court that Judge McDonough be censured and retired.¹⁵³ The respondent argued that no sanctions should be imposed and challenged the proceedings before the Board.¹⁵⁴

The first procedural challenge was that the Board had violated its rule requiring that an investigation be initiated only after a verified grievance is filed or upon a motion of the Board.¹⁵⁵ No verified grievance had been filed. Although the Board did not make a formal motion to investigate the respondent's conduct, the minutes of a meeting conducted two weeks after the initiation of the investigation revealed a consensus of the Board that the investigation continue.¹⁵⁶ The court indicated the technical violation was harmless because there was no claim that anything prejudicial occurred between the initiation of the investigation and its approval by the Board at the meeting two weeks later.¹⁵⁷

154. The methods used by Judge McDonough and the other two estate appraisers, who also contributed to Judge Bartholet's reelection fund, however, were labeled by the referee who conducted a hearing on the matter as "a device 'used by the contributor which tended to disguise the source from which the funds were secured.'" *See id.* at 499, 198 N.W.2d at 154-55. Based on this practice, as well as other disciplinary matters such as a plea of guilty to two counts of violating Minnesota's election law, Judge Bartholet was disbarred for lacking "that sense of fidelity owed by lawyers and judges in matters of trust reposed in them by the public." *See id.* at 499-500, 198 N.W.2d at 155.

For a discussion of the court's treatment of this matter in Judge McDonough's disciplinary proceeding, see notes 197-200 *infra* and accompanying text.

151. *See* Brief of Petitioner at 2-3.

152. *See id.* at 7.

153. *See id.* at 80.

154. *See* Reply Brief of Respondent at 64-65. The respondent also disputed the factual findings of the referee and the Board.

155. *See* 296 N.W.2d at 688. Although a sworn grievance had been filed in 1974, the investigation had not begun until September of 1976, when the Board received a letter critical of Judge McDonough from Judge Albertson, the Chief Judge of the Washington County Court. *See id.*

156. *See id.* Upon receipt of the letter critical of Judge McDonough written by Judge Albertson, the Chairman of the Board ordered the Executive Secretary to conduct an investigation. *See id.* A consensus of the Board at its October 8, 1976 meeting was that the investigation should be continued. *See id.*

157. *See id.* The court indicated that the October 8th meeting presumably satisfied the spirit of the rule because the Board was aware of and approved the investigation. *See id.* The court did note that although it "cannot condone less than strict compliance with procedural rules, this . . . [was] no ground for dismissal or remand." *Id.* The court found there was no merit to respondent's argument that until the Notice of Inquiry was filed in April, 1977, the Board was investigating the respondent without authorization under the rules. *See id.*; Brief of Respondent at 130.

This issue has been mooted for all future cases. Presently the rules provide that "[a]n inquiry . . . may be initiated upon any reasonable basis." MINN. R. BD. JUDICIAL STANDARDS 6(a)(1), 9 MINN. STAT. 765, 768 (1980).

Respondent's second claim was that his right under the Board's rules to respond to the allegations of misconduct¹⁵⁸ was prejudiced because the Board had already decided to file a complaint against him.¹⁵⁹ Respondent claimed that before he exercised his right to respond to the charges the Board's counsel informed respondent's counsel that the Board had already decided to file a complaint.¹⁶⁰ As a result, respondent claimed that he waived his right to respond thinking it would be pointless.¹⁶¹ The court was unwilling to nullify the proceedings "on the basis of such a double hearsay statement."¹⁶² The judge clearly had a right to respond and was notified of that fact and thus, the court held no violation of the rule had occurred.¹⁶³

Respondent also claimed that his rights were violated by the Board's failure to provide him with an opportunity to be heard prior to the Board's modification of the referee's findings.¹⁶⁴ Under the rules, the respondent had a right to oral argument upon the Board's proposal to

158. Rule D(2) provided that:

Before filing a complaint or recommending an order of private censure, the commission shall give written notice to the judge of the nature of the charges being made against him and he shall be afforded a reasonable opportunity to present personally, in writing or orally, such matters as he may choose for consideration by the commission explaining, refuting, or admitting the alleged misconduct or disability.

Minn. R. Comm'n Judicial Standards D(2), 4 MINN. STAT. app. 10, at 6863 (1976) (repealed 1978).

The respondent also contended his rights were violated under Rule D(2) when the Board invited him to appear at the Board's January 17, 1977 meeting and then retracted the invitation. *See* 296 N.W.2d at 689; Brief of Respondent at 131-32. Although Judge McDonough appeared, he claimed his right to be heard was violated because the Board was against his appearing, which rendered his presentation ineffective. *See* 296 N.W.2d at 689.

The court ruled that there was no violation of Rule D(2) because the respondent was afforded a right to respond pursuant to the Notice of Inquiry which was served in May, 1977. *See id.* "Thus, the January invitation was at the discretion of the Board, and so also was the cancellation. Though no rule violation occurred here, this incident was nevertheless unfortunate." *Id.* The court noted more direct communications between the Board and the respondent at the initial stages of the proceeding could have clarified many of the misunderstood and unsubstantiated charges. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

The respondent argued the decision to issue a complaint violated his rights, because it had been determined the respondent was guilty of misconduct before he had "an opportunity to state his case. Due process is the right to be apprised of the charges and the grounds for them and be afforded an opportunity to be heard in a proper manner to refute the charges." Brief of Respondent at 132 (citations omitted).

162. 296 N.W.2d at 689.

163. *See id.* "Whether or not the Board's counsel was attempting to discourage a response or just upon request trying to accurately assess the situation is a significant and unanswered question at this point; in that respect we note the call was initiated by Judge McDonough's counsel." *Id.*

164. *See* Brief of Respondent at 139.

modify the referee's findings.¹⁶⁵ Respondent's claim was not quite accurate because the Board served the respondent with tentative modifications prior to hearing any objections he might have. Only after a response had been received from the respondent were the final Findings and Recommendations approved, which differed in some respects from the earlier draft.¹⁶⁶ Therefore, the court found no violation of the rule.¹⁶⁷

In his fourth claim, the respondent argued that the Board disregarded Rule R and thus violated his due process rights.¹⁶⁸ Rule R required that a discipline recommendation be made by at least five members of the Board "who have considered the report of the referee and objections thereto."¹⁶⁹ The respondent claimed that only one copy of the referee's report was available and that therefore not all the members of the Board could have considered it at the time they made their final decision.¹⁷⁰ The contention was, however, incorrect, because the minutes of the Board's meeting revealed that copies of the report had previously been made available to the Board's members.¹⁷¹

Although the court rejected respondent's specific claims regarding alleged violations of his due process rights, it did indicate that the disciplinary proceedings were far from perfect.¹⁷² The court noted that the comments of the referee¹⁷³ at the formal hearing revealed certain short-

165. Rule N provided that if objections were filed to the referee's report or if the commission (Board) proposed to modify or reject the referee's findings, the respondent and his counsel were to be afforded oral argument before the commission. *See* Minn. R. Comm'n Judicial Standards N, 4 MINN. STAT. app. 10, at 6864 (1976) (repealed 1978).

166. *See* 296 N.W.2d at 689.

167. *See id.* The court, however, did indicate that it would have been a better procedure for respondent to have been heard on this matter: "[I]t would perhaps have been more in keeping with the spirit of this rule for the Board to have avoided becoming committed in any way to a position before hearing from Judge McDonough." *See id.* at 689-90 (footnote omitted).

168. *See* Brief of Respondent at 140.

169. *See* Minn. R. Comm'n Judicial Standards R, 4 MINN. STAT. app. 10, at 6864 (1976) (repealed 1978).

170. *See* Brief of Respondent at 140.

171. *See* 296 N.W.2d at 690.

Judge McDonough also claimed that "the Board's counsel dehorred the record concerning the Neilsen note matter." *See id.* The Neilsen matter related to the judge's probate of the estate of an individual from whom he had borrowed money and whether the judge had improperly excluded this indebtedness from the estate. *See id.* at 653-54 (reproduction of referee's Findings and Determination).

172. *See id.* at 690.

173. Judge Stahler's comments regarding some of the inadequacies of the proceedings were as follows:

1. Sufficient clear and convincing evidence to support a particular charge should be obtained prior to the issuance of a formal complaint alleging such charge. In the instant case, the charges herein were broad and covered an extended period of time. As to several of the charges, no evidence was introduced, and as to several other charges, clear and convincing evidence was lacking. In

comings in the proceedings and stated that these "procedural deficiencies . . . should be remedied in future proceedings."¹⁷⁴ These deficiencies included (1) failure to obtain sufficient evidence to support a charge prior to issuing a formal complaint thereby preventing respondent from being able to prepare responses to charges for which little or no evidence was offered;¹⁷⁵ (2) failure to allow sufficient time for discovery;¹⁷⁶ and

view of the fact that such charges are serious, and the fact that the Respondent, in order to meet all charges, was required to prepare proper defenses to each, he was placed under unnecessary and undue burden in preparing to face such charges as to which no evidence was produced.

2. Prior to pre-hearing conference, all discovery pursuant to the Rules of Civil Procedure should be completed. If such were done, the issues could be narrowed and rulings made as to admissibility of a great deal of the evidence. In the instant case, discovery was going on up to and including the time of actual hearing, all of which prolongs the hearing and calls for legal decisions to be made without opportunity for proper research. In this respect, the Referee seriously questions the *ten day* rule set forth in G3 of the Rules of the Board of Judicial Standards. Such rule provides that the commission shall, upon demand, furnish not less than *ten days* prior to any hearing, the names and addresses of all witnesses whose testimony the commission intends to offer at the hearing, together with copies of all written statements and transcripts of testimony of such witnesses in the possession of the commission which are relevant to the subject matter of the hearing. The benefits of such rule are far outweighed by the benefits derived from following Discovery Procedure of the District Courts. Under Rule G3, the respondent basically has but ten days to carry on discovery regarding information that is furnished under this rule, which in turn would not normally allow discovery to be completed prior to pre-hearing conference, and in some instances, the hearing itself. In fairness to counsel, it should be noted that both the counsel for the Petitioner and the counsel for the Respondent entered into this case after the Complaint was served and the Answer made.

3. Investigation by the Board in respect to the particular charges should be more thorough. In addition to interviewing the complainant, the investigation should include interviewing of all persons who may have knowledge about the particular incident, even though such knowledge may prove to be adverse to that of the complaining witness. If such practice were followed, the Board would have a better basis upon which to determine whether a specific complaint should result in a formal charge, and the Board would be in a better position to determine whether or not a particular charge could be proved by clear and convincing evidence.

In making the above statement the Referee is fully cognizant of the fact that the Board has very limited investigatory personnel; however, considering the serious implications and damage that may result to a judge against whom a charge is made, perhaps additional personnel should be employed under such circumstances.

This problem might be in part eliminated if the judge against whom [a] complaint is pending were given greater opportunity under Rule 2D, in addition to being allowed to explain his defenses to the complaint, be given an opportunity to present to the Board a list of witnesses whom he desires to be interviewed in respect to the charge.

Judge John T. McDonough, No. 76-36, at 63-65 (Minn. Bd. Judicial Standards Mar. 14, 1978) (emphasis in original).

174. See 296 N.W.2d at 690.

175. See note 173 *supra*. Respondent in fact complained "that the 'scattershot' nature of the Board's charges, many of which went unsubstantiated . . . made the preparation of a defense difficult and unduly burdensome." 296 N.W.2d at 690.

Support for this contention is found not only in the referee's comments but also in the

(3) failure to conduct more thorough investigations including interviews with individuals who may possess knowledge adverse to that of the complaining party.¹⁷⁷

These procedural insufficiencies, however, did not preclude review of the case by the court.¹⁷⁸ Because the court's independent judgment was involved "the allegations of unfairness surrounding this matter . . . resulted in particularly zealous study by every member of . . . [the] court of the record," the court was "somewhat less concerned about the possible biases and procedural shortcomings below."¹⁷⁹ Thus, the court concluded that none of the defects was serious enough to nullify the proceedings and proceeded to consider the case on the merits.¹⁸⁰

The *McDonough* court then decided two additional legal issues that are relevant to judicial disciplinary proceedings.¹⁸¹ The first issue was the interpretation to be given to the statute of limitations,¹⁸² which provided

disposition of the various complaints against Judge McDonough. The referee dismissed 4 charges because no evidence was offered, 1 was dismissed because little or no evidence was offered, 1 was barred by the statute of limitations, 22 were not supported by clear and convincing evidence, and 1 charge was not shown to have violated the judicial canons. *See* Judge John T. McDonough, No. 76-36 (Minn. Bd. Judicial Standards Mar. 14, 1978), reprinted in *In re McDonough*, 296 N.W.2d 648 (Minn. 1979), modified, 296 N.W.2d 699 (Minn. 1980).

The referee did, however, determine that 14 of the charges against Judge McDonough were established and proved improper conduct on the judge's part. *See id.* (one of 14 was characterized as technical violation).

176. *See* note 173 *supra*. The respondent indicated that in many instances he was given very short notice with which to respond to adverse claims and witnesses. *See* 296 N.W.2d at 690.

177. *See* note 173 *supra*. The respondent in fact objected to the Board's policy of "investigating" a complaint by only interviewing the complainant and failing to speak with those who might have a different story. *See* 296 N.W.2d at 690.

178. *See* 296 N.W.2d at 690-91. *See also* note 149 *supra*.

179. 296 N.W.2d at 691.

The court noted that if the procedures had affected the record the remedy would be to remand for additional evidence. *See id.* Both parties, however, opposed such a solution and praised the referee's conduct. *See id.*

The respondent, however, did move the court to remand the case to the referee for the limited purpose of recommending sanctions to the court. The motion was considered and denied by the court. *See id.* n.8.

180. *See id.* The court also expressed its belief that the procedural shortcomings encountered by Judge McDonough would be ironed out in future proceedings. "The obvious difficulties with institutional inertia in a proceeding of this type are of concern, and we express our confidence that with additional experience the Board will act to minimize them and avoid the assumption of an adversary posture." *Id.* This reference to the Board's assuming a less adversary posture in the future may have been a response to the respondent's complaint regarding the procedures "used by the Board when it employed the same counsel who lost the case before Judge Stahler to advise and draft the modifications and rejections of Judge Stahler's findings and, therefore, persuade the Board of the sufficiency of the evidence in this case." Brief of Respondent at 142-43.

181. *See* notes 182-92 *infra* and accompanying text.

182. *See* 296 N.W.2d at 691.

that "the supreme court may . . . censure or remove a judge for action or inaction occurring not more than four years prior to such action being reported to the board on judicial standards."¹⁸³ The Board argued that the statute allowed all incidents taking place less than four years prior to the initial complaint to be considered.¹⁸⁴ Respondent argued that only those events occurring less than four years before the Notice of Inquiry could be considered.¹⁸⁵ The supreme court rejected both arguments and held actions were restricted "to those incidents which were reported to the Board within four years of their occurrence, no matter how old they are when considered."¹⁸⁶ The statute since has been amended and presently allows for consideration of any matter regardless of the date of occurrence.¹⁸⁷

The second issue involved the meaning to be given to the "clear and convincing" standard of proof used in judicial disciplinary proceedings.¹⁸⁸ The respondent argued that this standard implies corroboration

183. See Act of June 7, 1971, ch. 909, § 2, 1971 Minn. Laws 1862, 1863 (amended 1978). The present statute provides that "[t]he Board is specifically empowered to reopen any matter wherein any information or evidence was previously precluded by a statute of limitations or by a previously existing provision of time limitation." MINN. STAT. § 490.16(3) (1980).

184. See 296 N.W.2d at 691. In its brief the Board stated:

The Board does not have the manpower . . . to investigate fully every judge on whom a seemingly isolated complaint is received; yet that is what Respondent's interpretation of Minn. Stat. § 490.16, Subd. 3, would require if other incidents and behavior of a judge are not to be lost from the Board's (and the Supreme Court's) consideration. If a seemingly isolated incident turns out upon full investigation following further reports of other incidents to be part of a pattern of behavior, the Board should be allowed to consider and present evidence on conduct occurring within the statutory period

Brief of Petitioner at 57-58.

185. See 296 N.W.2d at 691. Respondent in his brief argued

[a] four year time period should be a sufficient amount of time for the Board to view a judge's actions.

. . . .

. . . If this Court permits the Board to use past complaints as the basis for the start of the four year statute then the Board can, in effect, nullify the operation of a limitations statute by simply never closing a single file.

Respondent's Brief at 11, 13.

186. See 296 N.W.2d at 691 (emphasis in original). The effect of this interpretation was to eliminate one allegation of misconduct from the court's consideration and it was disregarded in the court's imposition of sanctions. *Id.*

187. See MINN. STAT. § 490.16(3) (1980); note 183 *supra*. In a case involving discipline of a lawyer, the Minnesota Supreme Court held that a two-year statute of limitations on lawyer disciplinary proceedings was unconstitutional "as an attempted projection of legislative power into the judicial department." *In re Tracy*, 197 Minn. 35, 43-44, 266 N.W. 88, 92 (per curiam), modified, 197 Minn. 47, 267 N.W. 142 (1936) (per curiam).

188. See 296 N.W.2d at 691.

The rules at the time provided: "The commission, upon receiving a verified statement of grievance . . . shall make a preliminary investigation to determine whether a complaint shall be filed and a hearing held. The commission may on its own motion and without receiving a verified statement make inquiry and a preliminary investigation

of the evidence of misconduct and cited *In re Boyd*,¹⁸⁹ a Florida disciplinary case, in support of his argument.¹⁹⁰ The *McDonough* court, however, rejected this contention and indicated that no mechanistic requirement is necessary because "uncorroborated evidence may be clear and convincing."¹⁹¹ The court also stated that "depending on its source, uncorroborated evidence may be more reliable than that remotely corroborated by a dubious source."¹⁹²

Following resolution of these legal issues the *McDonough* court reviewed the findings of the referee and the Board's modification of those findings.¹⁹³ Based on its review, the court rejected the Board's recommendation of censure and retirement stating that while the respondent's behavior was improper it was not the result of deliberate or long-term misconduct motivated by financial self-interest.¹⁹⁴ Noting the respondent's twenty-three years of service as a judge, the court indicated that except for isolated incidents the judge's conduct had been "proper and judicious."¹⁹⁵ The court merely censured the judge and fined him three months salary.¹⁹⁶

. . . ." Minn. R. Comm'n Judicial Standards D(1), 4 MINN. STAT. app. 10, at 6863 (repealed 1978).

For a discussion of the clear and convincing standard imposed under the present rules, see note 85 *supra* and accompanying text. Under Missouri's standard of proof charges need only be proved by a preponderance of the evidence. See *In re Duncan*, 541 S.W.2d 564, 569 (Mo. 1976) (per curiam).

189. 308 So. 2d 13 (Fla. 1975) (per curiam).

190. See Brief of Respondent at 16-17.

The *Boyd* court, recognizing that Florida did not have a comprehensive body of law on judicial discipline, analogized to lawyer disciplinary cases regarding the meaning of the "clear and convincing" standard of proof. See *In re Boyd*, 308 So. 2d 13, 21 (Fla. 1975) (per curiam). The court indicated that in lawyer disciplinary cases

evidence to sustain a charge of unprofessional conduct against a member of the bar where in his testimony under oath he has fully and completely denied the asserted wrongful act, must be clear and convincing and that degree of evidence does not flow from the testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances.

Id.

191. See 296 N.W.2d at 692.

192. See *id.* The court noted that uncorroborated evidence may meet this standard of proof "if the trier of fact can impose discipline with clarity and conviction of its factual justification." *Id.* "[T]o establish such an arbitrary requirement would be counterproductive" *Id.*

193. See *id.* at 692-96.

194. See *id.* at 696 ("Removal from office is less mandatory in the absence of such behavior."). The following are some of the complaints and charges against Judge McDonough: (1) that he had probated and closed the estate of an individual to whom he owed money; (2) that he abused and threatened attorneys appearing before him; (3) that he received preferential bank treatment; and (4) that he had a policy of sentencing drunk drivers to a drug rehabilitation program without first conducting a presentence investigation. See *id.* at 692-96.

195. See *id.* at 697.

196. See *id.* at 698.

Following its disposition of the case, the court issued a supplemental order concerning an allegation of misconduct not dealt with in its earlier opinion.¹⁹⁷ The court indicated that *res judicata* was not directly applicable because the matter was not directly addressed in its earlier opinion.¹⁹⁸ The court, however, found instructive the principle that a judgment on the merits acts as a bar in a second suit to all matters based on the same cause of action that might have been litigated in the first suit.¹⁹⁹ Therefore, the court ruled that fundamental fairness dictated that the matter be closed.²⁰⁰

V. FUTURE CHALLENGES TO MINNESOTA'S JUDICIAL DISCIPLINARY PROCEEDINGS

To date there have been relatively few challenges to the procedures and methods of the Minnesota Board on Judicial Standards. As a result, the Minnesota Supreme Court has yet to articulate clearly which due process rights apply to these proceedings.²⁰¹ The experience of other states indicates that the Minnesota Supreme Court will be faced with a

The findings of misconduct which we have adopted collectively creates a picture of Judge McDonough too often lacking the patience, open-mindedness, and restraint required of a judge. The Board refers to these personality factors as "lack of judicial temperament," and we find the phrase not entirely inappropriate. There is no doubt that, in the extreme, such lack of judicial temperament could be of itself grounds for removal even absent self-enrichment or bad faith. The effective functioning of the judicial system depends not only on justice in fact being administered but that citizens feel they are being provided fair treatment and just decisions.

Id. at 696-97. The court went on to indicate that conduct on or off the bench that tarnishes this image may in some instances be dealt with only by removal. *See id.* at 697.

197. *See In re McDonough*, 296 N.W.2d 699 (Minn. 1980). The matter arose as a result of the fact that the statute of limitations applicable at the time of the hearing barred consideration of the complaint termed the "Bartholet Matter." *See id.* For a discussion of the "Bartholet Matter," see note 150 *supra*. The statute of limitations, however, was amended between the time of the hearing and oral argument before the court. *See* 296 N.W.2d at 699-700. The court in its earlier opinion failed both to address specifically which limitation period applied and to adopt or reject the findings of the Board and referee regarding the "Bartholet Matter." *See id.* at 700.

198. *See* 296 N.W.2d at 700.

199. *See id.* The court also indicated "[a] judgment acts as a bar in a subsequent action not only as to issues submitted in a prior suit but also as to issues covered in the pleadings which were not expressly determined in the first action and which were not withdrawn." *Id.*

200. Stating that earlier cases expressed the court's preference for all charges of misconduct being contained in one disciplinary proceeding, the court believed that due to the extensive proceedings to date it would be fundamentally unfair to reopen the proceedings. *See id.* at 700-01.

201. The Minnesota court has indicated, however, that general due process rights to fair and regular proceedings are applicable. *See In re Gillard*, 271 N.W.2d 785, 812 (Minn. 1978) (*per curiam*). In addition, the Board's rules are not helpful because they merely provide the "judge shall be accorded due process of law." MINN. R. BD. JUDICIAL STANDARDS 9(b), 9 MINN. STAT. 765, 771 (1980).

variety of challenges to the proceedings of the Board in the future.²⁰² The discussion that follows is an examination of how other jurisdictions have handled various challenges to judicial disciplinary proceedings and how the Minnesota Supreme Court is likely to resolve these challenges.²⁰³ Where appropriate, recommended changes in the procedures will be set forth.²⁰⁴

A. Combined Investigatory and Adjudicative Functions of Judicial Disciplinary Systems

A number of jurisdictions have addressed the contention that the combined investigatory and adjudicatory functions of judicial disciplinary bodies is unconstitutional²⁰⁵ because it is a denial of an individual's right

202. See notes 205-301 *infra* and accompanying text.

203. This analysis is by no means all-inclusive. For example, one area that has resulted in a significant amount of litigation is the confidentiality of judicial disciplinary proceedings. The cases considering confidentiality are for the most part peculiar to the facts involved and thus are incapable of forming the basis of any general rule as the following discussion indicates.

The United States Supreme Court in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), was faced with the issue of whether criminal sanctions could be imposed for publishing truthful information relating to confidential judicial disciplinary proceedings. See *id.* at 837. The Court found that the publication in question was near the core of the first amendment and the interests of the State of Virginia were insufficient to justify the encroachment on freedom of speech. See *id.* at 838. The Court did recognize, however, that the confidentiality requirement serves a valuable function and in all likelihood enhances the effectiveness of judicial disciplinary bodies. See *id.* at 835-36.

Several other courts have considered the issue of whether confidential judicial discipline records could be subpoenaed or discovered for use in a civil or criminal proceeding. See, e.g., *Forbes v. Earle*, 298 So. 2d 1 (Fla. 1974); *People ex rel. Ill. Judicial Inquiry Bd. v. Hartel*, 72 Ill. 2d 225, 380 N.E.2d 801 (1978), *cert. denied*, 440 U.S. 915 (1979); *Council on Judicial Complaints v. Maley*, 607 P.2d 1180 (Okla. 1980). In two cases the issue was resolved by permitting an in camera inspection of the documents to determine what, if any, portions of the material requested were relevant to the proceeding for which it was sought. See *Forbes v. Earle*, 298 So. 2d 1, 5 (Fla. 1974) (legislature sought information for impeachment proceeding); *People ex rel. Ill. Judicial Inquiry Bd. v. Hartel*, 72 Ill. 2d 225, 238, 380 N.E.2d 801, 807 (1978), *cert. denied*, 440 U.S. 915 (1979) (judge sought material for defense of criminal charge against him; court allowed information that plainly negated guilt). In the third case, the court held that the Oklahoma Council on Judicial Complaints could not be compelled to answer interrogatories regarding the disposition, if any, of a complaint filed against a judge in a libel action brought by a lawyer against a newspaper. See *Council on Judicial Complaints v. Maley*, 607 P.2d 1180, 1181, 1187 (Okla. 1980).

The Minnesota Board on Judicial Standards has never been faced with a subpoena or discovery request that sought information that was confidential under the rules. See Interview with George J. Kurvers, *supra* note 57, at 2. In all likelihood the Board would contest such a request. See *id.* at 2-3. For a discussion of the confidentiality requirements under the ABA Standards, see Todd & Proctor, *supra* note 72, at 189-99.

204. See notes 219-25, 232-34, 261, 306-07 *infra* and accompanying text.

205. See note 207 *infra*.

to an impartial tribunal.²⁰⁶ Courts have uniformly rejected this argument and upheld the validity of the combined investigatory and adjudicatory functions of a judicial disciplinary body²⁰⁷ because it does not violate the due process doctrine of fundamental fairness.²⁰⁸

Minnesota is likely to reach the same result for three reasons.²⁰⁹ First, precedent in other jurisdictions indicates that courts will not find this combination of functions unconstitutional on due process grounds.²¹⁰ Second, the United States Supreme Court, in *Withrow v. Larkin*,²¹¹ held that the combination of investigatory and adjudicatory functions in an administrative agency is not unconstitutional.²¹² Although this decision did not involve judicial discipline, it has been held controlling in judicial disciplinary cases.²¹³ Finally, if formal disciplinary proceedings are involved, the Board does not adjudicate but only makes a recommendation of discipline to the supreme court,²¹⁴ thus, there are no combined functions to attack.

206. See *In re Hanson*, 532 P.2d 303, 306 (Alaska 1975); *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977) (per curiam); cf. *In re Kelly*, 238 So. 2d 565, 570 (Fla. 1970) (claimed due process rights violated because Commission exercised functions of "investigation, prosecution, grand jury, and judge and jury of facts and law"), cert. denied, 401 U.S. 962 (1971).

207. See, e.g., *Halleck v. Berliner*, 427 F. Supp. 1225, 1243-44 (D.D.C. 1977); *In re Hanson*, 532 P.2d 303, 306 (Alaska 1975); *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 522 n.7, 526 P.2d 268, 275 n.7, 116 Cal. Rptr. 260, 267 n.7 (1974); *In re Kelly*, 238 So. 2d 565, 570-71 (Fla. 1970), cert. denied, 401 U.S. 962 (1971); *In re Rome*, 218 Kan. 198, 205, 542 P.2d 676, 683 (1975) (per curiam); *Nicholson v. Judicial Retirement & Removal Comm'n*, 562 S.W.2d 306, 309 (Ky. 1978) (per curiam); *In re Haggerty*, 257 La. 1, 12, 241 So. 2d 469, 472 (1970); *In re Diener*, 268 Md. 659, 677-79, 304 A.2d 587, 597-98 (1973), cert. denied, 415 U.S. 989 (1974); *In re Del Rio*, 400 Mich. 665, 691, 256 N.W.2d 727, 736 (1977) (per curiam); *In re Mikesell*, 396 Mich. 517, 529-31, 243 N.W.2d 86, 91-92 (1976) (per curiam); *In re Storie*, 574 S.W.2d 369, 373 (Mo. 1978); *In re Duncan*, 541 S.W.2d 564, 568 (Mo. 1976) (per curiam); *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977) (per curiam).

A due process challenge to an executive secretary serving as the complainant, prosecutor, factfinder, and voting member of the Board similarly has been rejected. See *Keiser v. Bell*, 332 F. Supp. 608, 617-19 (E.D. Pa. 1971).

208. See *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 522 n.7, 526 P.2d 268, 275 n.7, 116 Cal. Rptr. 260, 267 n.7 (1974); *In re Kelly*, 238 So. 2d 565, 571 (Fla. 1970), cert. denied, 401 U.S. 962 (1971).

209. See notes 210-14 *infra* and accompanying text.

210. See Note, *State Judicial Disciplinary Commissions and Proceedings: Developing Administrative And Legal Standards For Evaluating Judicial Misconduct*, 10 RUTGERS-CAMDEN L.J. 685, 693 (1979).

211. 421 U.S. 35 (1975) (investigation of alleged physician misconduct by State Examining Board).

212. See *id.* at 55.

213. See, e.g., *In re Del Rio*, 400 Mich. 665, 691, 256 N.W.2d 727, 737 (1977) (per curiam); *In re Mikesell*, 396 Mich. 517, 530, 243 N.W.2d 86, 92 (1976) (per curiam).

214. See notes 91-93 *supra* and accompanying text.

*B. Procedural Due Process—Informal Stage**1. In General*

Generally, in an administrative setting an individual is not entitled to the full panoply of due process rights when his conduct merely is being investigated and no adjudication occurs.²¹⁵ Before formal proceedings are instituted a judge has no due process right to notice that a complaint has been filed or that an investigation has begun.²¹⁶ Even if notice at the informal stage was required by the Board's rules, due process does not require that the notice set forth all the charges ultimately considered if the judge is notified of the additional charges in a timely manner.²¹⁷ Further, a judge has no right to be present or to cross-examine the persons questioned at the preliminary stage of the proceedings if at that point, the proceedings are investigatory and not adjudicatory.²¹⁸

It is, however, recommended that in all cases in which the Board has determined that an in-depth investigation should be conducted,²¹⁹ the judge should be notified that a complaint has been filed²²⁰ and be allowed to respond.²²¹ Although this may prove repetitious if the case proceeds to a formal hearing, such duplication is justified for two reasons. First, the judge's response to the charges might resolve the matter.²²² If not, it provides the judge with additional time to investigate the matter

215. See *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (involved question of due process rights applicable during investigation by Civil Rights Commission of discriminatory deprivation of right to vote based on color, race, religion, or national origin).

216. See *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 519, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1974); *In re Storie*, 574 S.W.2d 369, 372 (Mo. 1978) (quoting *McCartney*) (judge claimed due process violation because notice did not indicate investigation in progress or suggest judge's conduct was improper). The *Storie* court, however, held that the judge should be afforded an opportunity to respond prior to formal charges because his response might establish that no improprieties had occurred. See *id.* at 373.

217. See *In re Carrillo*, 542 S.W.2d 105, 108 (Tex. 1976).

218. See *In re Troy*, 364 Mass. 15, 24-25, 306 N.E.2d 203, 208-09 (1973) (per curiam).

219. See Interview with George J. Kurvers, *supra* note 57, at 1. "After a preliminary investigation by the executive secretary, the board will review those findings and determine whether the investigation should be continued and conducted in depth." *Id.*

220. Cf. STANDARDS RELATING TO JUDICIAL DISCIPLINE, *supra* note 57, § 4.5, Commentary, at 23 ("As a matter of fact, in a great majority of the cases, this notice should be given."). Under the current rules, notice of the complaint is discretionary prior to a finding of probable cause. See MINN. R. BD. JUDICIAL STANDARDS 6(d)(1), 9 MINN. STAT. 765, 769 (1980).

221. In fact, at least one jurisdiction requires the judge be notified and allowed to respond before an investigation is begun. See *McKenney v. Commission on Judicial Conduct*, ___ Mass. ___, ___, 402 N.E.2d 1356, 1360 (1980).

222. As the referee in the *McDonough* matter noted, the failure of the Board to investigate adequately several of the charges prior to the formal hearing resulted in the respondent's preparing a defense to a charge on which little or no evidence was offered. See note 173 *supra*. See also note 216 *supra*.

in preparation for the possibility of a formal hearing.²²³ Second, should the Board decide to discipline the judge informally,²²⁴ notice would be mandated by notions of due process and fundamental fairness.²²⁵

2. Discipline at Informal Stage

When an administrative agency adjudicates, due process requires an opportunity to be heard and to examine witnesses.²²⁶ Although the Board on Judicial Standards is not an administrative agency, the procedures used by the Board must comport with due process notions.²²⁷ Under present procedures, the Board may impose sanctions upon a judge's conduct or issue a private reprimand even if it has determined that there is no probable cause to proceed to a formal hearing.²²⁸ The rules do not provide a judge with an opportunity to be heard at this stage.²²⁹ In practice, however, the Board normally notifies the judge of the complaint and allows him to respond during the informal stage.²³⁰ The rule allowing the Board to impose sanctions on a judge's conduct is unconstitutional because the judge is not allowed an opportunity to be heard commensurate with due process.²³¹

Because informal discipline is in effect an adjudication, fundamental fairness and due process require that the individual to be disciplined be

223. Thus a judge would have time to investigate a matter before being required to respond to a statement of allegations.

224. See MINN. R. BD. JUDICIAL STANDARDS 6(g), 9 MINN. STAT. 765, 769 (1980). The Standards allow the Board to make any of the following dispositions: "1) The board may issue a private reprimand. 2) The board may by informal adjustment dispose of a complaint by: (i) Informing or admonishing the judge that his conduct is or may be cause for discipline; (ii) Directing professional counseling or assistance for the judge; or (iii) Imposing conditions on a judge's conduct." *Id.*

225. See note 226 *infra* and accompanying text. *But cf.* STANDARDS RELATING TO JUDICIAL DISCIPLINE, *supra* note 57, § 4.5, Commentary, at 23 (notice should be delayed if identity of complainant could be readily determined or if it would enable judge to destroy evidence).

226. See *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969).

227. See note 201 *supra* and accompanying text; *cf.* Cohn, *The limited due process rights of judges in disciplinary proceedings*, 63 JUDICATURE 232, 237 (1979) (general due process decisions of United States Supreme Court "are so clearly apt as constitutional principle as to virtually foreclose further controversy").

228. See MINN. R. BD. JUDICIAL STANDARDS 6(g), 9 MINN. STAT. 765, 769 (1980). See also notes 69-72 *supra* and accompanying text. The Board has in fact exercised this power. See ANNUAL REPORT FOR 1980, *supra* note 102, at 5.

229. See note 67 *supra* and accompanying text.

230. See Interview with George J. Kurvers, *supra* note 57, at 1.

231. See notes 226-29 *supra* and accompanying text. See also B. SCHWARTZ, ADMINISTRATIVE LAW § 67, at 192 (1976) ("Procedural due process is essentially a requirement of notice and hearing."); *cf.* *In re Nowell*, 293 N.C. 235, 241-42, 237 S.E.2d 246, 251 (1977) (per curiam) ("fundamental fairness entitles the judge to a hearing" when censure or removal is likely). This would not be true in those instances in which the Board has allowed the judge to respond following notice of the complaint.

Other commentators consider the ABA's rule, which is similar to the Minnesota rule,

notified of the charges and allowed an opportunity to be heard.²³² Therefore, the rules of the Board should specifically provide for notice and an opportunity to be heard prior to the imposition of informal discipline.²³³ Alternatively, the power of the Board to dispose informally of the complaint should be limited to issuing a private warning or reprimand.²³⁴ A warning or reprimand is not an adjudication that infringes upon a judge's rights or actions and therefore, the due process requirement of a hearing would not be mandated.

3. *Interim Suspension*

Under certain circumstances a court may order the suspension of a judge before final resolution of disciplinary proceedings.²³⁵ Interim suspension has been challenged on the grounds that it is a deprivation of

to be troublesome because it grants "a peculiarly wide scope of discretion to the commission." See Todd & Proctor, *supra* note 72, at 184-85.

The ABA Standards attempt to avoid this problem by requiring that the judge being informally disciplined sign a waiver of his right to object to the findings and his right to a hearing. See note 72 *supra*.

The constitutionality of imposing discipline at the informal stage is to be distinguished from interim suspension because the latter does not become final until the court has reviewed the matter and the judge has had an opportunity to be heard. See notes 235-44 *infra* and accompanying text. There is no procedure under the rules for review of the Board's imposition of discipline or sanctions at the informal stage.

A further argument concerning the constitutionality of informal discipline is found in *People ex rel. Harrod v. Illinois Courts Comm'n*, 69 Ill. 2d 445, 372 N.E.2d 53 (1977). There, the court stated:

Inasmuch as the Commission is not a part of the tripartite court system in this State, it possesses no power to interpret statutory ambiguities or to compel judges to conform their conduct to any such interpretation. . . . To grant the Commission such authority would interfere with an independent judicial system and would place trial judges in an untenable position.

See *id.* at 473, 372 N.E.2d at 66. Based on the *Harrod* court's reasoning, a judge who failed to comply with or awkwardly construed Minnesota's sentencing guidelines could not be informally disciplined because his conduct involved construction of a statute whose meaning is to be determined by the courts.

232. See notes 226-27, 231 *supra* and accompanying text.

233. Although the Board may follow such a procedure on its own initiative, see Interview with George J. Kurvers, *supra* note 57, at 1, the rules should incorporate this procedure. When the fundamental rights of an individual are involved, such procedures should not be at the discretion of the Board. California specifically provides for review by the supreme court when there is private admonishment by the California Commission. See note 43 *supra*.

234. The Board would thereby be prevented from imposing conditions on the judge's conduct or directing counseling for the judge as it may under the current rules. See MINN. R. BD. JUDICIAL STANDARDS 6(g)(2)(ii)-(iii), 9 MINN. STAT. 765, 769 (1980).

The power to discipline lawyers informally, on the other hand, is expressly limited to issuing a warning. See RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY 7(b)(1), 8(c)(2), 9 MINN. STAT. 748, 752 (1980). The lawyer concerned may request the propriety of the warning be reviewed by a panel of the Lawyers Professional Responsibility Board. See *id.* 8(c)(2)-(3), 9 MINN. STAT. at 752.

235. See, e.g., *In re Del Rio*, 400 Mich. 665, 682 & n.5, 256 N.W.2d 727, 733 & n.5

liberty or property contrary to both state and federal constitutional guarantees of due process.²³⁶ A judge, however, does not have a federal constitutional right to hold or retain a state judicial office.²³⁷ Rather, such a right derives from a state's constitution or statutes²³⁸ and a state may set appropriate standards of conduct for those holding judicial office.²³⁹ Permanent removal of a judge occurs only after a full and complete hearing on the charges.²⁴⁰ As a general rule, due process does not require that the right to a full and fair opportunity to be heard be provided prior to the suspension of employment.²⁴¹ Therefore, because there is no constitutional right to retain judicial office, temporarily removing a judge from office with full pay for an alleged violation of judicial standards and subsequently affording the judge a full and complete hearing does not offend due process.²⁴²

Minnesota's constitution specifically provides that a judge may be removed from office for conduct prejudicial to the administration of justice.²⁴³ Therefore, interim suspension of a judge under Minnesota's present procedures if followed by a full and complete hearing would not

(1977) (per curiam); MINN. R. BD. JUDICIAL STANDARDS 7, 9 MINN. STAT. 765, 769-70 (1980).

236. See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1136 (E.D. Mich. 1976) (federal constitution); *In re Del Rio*, 400 Mich. 665, 682, 256 N.W.2d 727, 733 (1977) (per curiam) (state and federal constitutions).

In both cases the judge argued the interim suspension damaged his good name, reputation, and opportunity to be elected, to which each court responded: "One's good name and reputation alone, apart from some more tangible interest such as employment, however, do not implicate any 'liberty' or 'property' interests 'sufficient to invoke the procedural protection of the Due Process Clause.'" See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1136 (E.D. Mich. 1976); *In re Del Rio*, 400 Mich. 665, 685, 256 N.W.2d 727, 734 (1977) (per curiam) (quoting *Gruenberg*).

237. See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1136 (E.D. Mich. 1976); *Peterson v. Knutson*, 367 F. Supp. 515, 517 (D. Minn. 1973), *aff'd*, 505 F.2d 736 (8th Cir. 1974); *Napolitano v. Ward*, 317 F. Supp. 79, 85 (N.D. Ill. 1970); *In re Del Rio*, 400 Mich. 665, 682, 256 N.W.2d 727, 733 (1977) (per curiam).

238. See, e.g., *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976); *In re Del Rio*, 400 Mich. 665, 682, 256 N.W.2d 727, 733 (1977) (per curiam); MINN. CONST. art. VI, § 7.

239. See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976); *In re Del Rio*, 400 Mich. 665, 683, 256 N.W.2d 727, 733 (1977) (per curiam). The *Del Rio* court noted "[t]here is no federal constitution stricture that this Court is aware of which mandates that a state must permit a judge to hold judicial office unhampered by appropriate standards of judicial conduct." *Id.* (citation omitted).

240. See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1136 (E.D. Mich. 1976); *In re Del Rio*, 400 Mich. 665, 684, 256 N.W.2d 727, 734 (1977) (per curiam).

241. See *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974) (Court upheld administrative procedure whereby individual was suspended from office and then allowed full hearing; procedure satisfied due process clause).

242. See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1136 (E.D. Mich. 1976); *In re Del Rio*, 400 Mich. 665, 684, 256 N.W.2d 727, 734 (1977) (per curiam); note 241 *supra*.

243. See MINN. CONST. art. VI, § 9.

violate a judge's due process rights.²⁴⁴

4. *Prehearing Discovery*

Currently, Minnesota allows for discovery only after a finding of probable cause to proceed has been made.²⁴⁵ This practice is derived from the rule requiring the proceedings to be confidential prior to the probable cause determination.²⁴⁶ Because the proceedings are merely investigatory at this juncture, a judge would not have a due process right to discovery.²⁴⁷ In at least one instance, however, the Minnesota Board has allowed discovery prior to the formal hearing stage.²⁴⁸ One possible explanation for such a procedure is that it permits a judge to formulate better a response to a disciplinary charge, thus reducing the number of charges at the formal hearing, if not eliminating the need for formal proceedings altogether.²⁴⁹

244. See notes 235-42 *supra* and accompanying text. The present procedures provide for review of an interim suspension when a misdemeanor charge is filed or if the judge is found incompetent by the Board. MINN. R. BD. JUDICIAL STANDARDS 7(c)-(d), 9 MINN. STAT. 765, 769-70 (1980). The rules fail to specify whether there is review of an interim suspension when the judge has been charged with violation of a felony under state or federal law. See *id.* at 7(a), 9 MINN. STAT. at 769.

The Minnesota procedures are different from the two cases in which interim suspension was upheld. In both cases the interim suspension occurred only after the judge was allowed to respond to the charges, even though the full and complete hearing did not occur until after the interim suspension. See *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1136 (E.D. Mich. 1976); *In re Del Rio*, 400 Mich. 665, 683, 256 N.W.2d 727, 733-34 (1977) (per curiam). The Minnesota procedures contain no such requirement. See MINN. R. BD. JUDICIAL STANDARDS 7, 9 MINN. STAT. 765, 769-70 (1980).

245. See MINN. R. BD. JUDICIAL STANDARDS 8(d)(3), 9 MINN. STAT. 765, 770 (1980).

The extent to which, if any, a judge is entitled to discovery prior to a probable cause determination is unclear. The Michigan court in *In re Del Rio*, 400 Mich. 665, 256 N.W.2d 727 (1977) (per curiam), held that a judge's due process rights were not violated when he was denied precomplaint discovery, reasoning that a party to a quasi-judicial proceeding is not constitutionally entitled to discovery. See *id.* at 687 & n.7, 256 N.W.2d at 735 & n.7.

246. See MINN. R. BD. JUDICIAL STANDARDS 5(a)(1), 9 MINN. STAT. 765, 768 (1980) ("All proceedings shall be confidential until there has been a determination of probable cause and formal charges have been filed pursuant to Rule 8(c).").

The Michigan court has noted:

[T]he policy of confidentiality protects . . . witnesses and citizen complainants. If the respondent and others similarly situated were allowed to discover the name of every complainant, including those who will not appear and those whose complaints have been dismissed, the free flow of information to the Commission would be curtailed. The Commission carefully investigates all complaints and this Court would not want to discourage citizen complainants from voicing their ideas.

In re Mikesell, 396 Mich. 517, 534, 243 N.W.2d 86, 94 (1976) (per curiam).

247. Cf. note 215 *supra* and accompanying text (full panoply of due process rights do not attach during investigatory stage of proceedings).

248. See Interview with George J. Kurvers, *supra* note 57, at 1.

249. Cf. *In re Storie*, 574 S.W.2d 369, 373 (Mo. 1978) (judge should be allowed re-

C. Procedural Due Process—Formal Stage

1. Discovery

Several courts have addressed the question of whether a judge is entitled to full discovery at the prehearing stage of formal proceedings.²⁵⁰ These jurisdictions have held that the extent of discovery rests in the sound discretion of the presiding authority.²⁵¹ The limits on discovery have included prohibiting the deposing of witnesses,²⁵² allowing only three depositions on the judge's behalf,²⁵³ and prohibiting the use of interrogatories.²⁵⁴

Because the Minnesota rules provide for discovery to the same extent as that permitted in civil proceedings, it is unlikely that Minnesota will face this issue.²⁵⁵ The amount of time available for discovery prior to the formal hearing is, however, limited to fifty days.²⁵⁶ This short period of time, in effect, prohibits extensive discovery.²⁵⁷ If broad discovery is the desired result, fundamental fairness would seem to dictate that a judge be allowed more time to prepare for the hearing.²⁵⁸ Further, during the first twenty days of this fifty-day period much of the judge's time and effort and that of his counsel is spent preparing a response to the state-

sponse at informal stage because judge's account may reveal no improprieties occurred thus obviating need for formal hearing or reducing charges in formal complaint).

250. See, e.g., *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 520, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1974); *In re Dupont*, 322 So. 2d 180, 183 (La. 1975); *In re Del Rio*, 400 Mich. 665, 686, 256 N.W.2d 727, 735 (1977) (per curiam); *In re Mikesell*, 396 Mich. 517, 531, 243 N.W.2d 86, 92-93 (1976) (per curiam); *In re Bates*, 555 S.W.2d 420, 429 (Tex. 1977); *In re Van Susteren*, 82 Wis. 2d 307, 313, 262 N.W.2d 133, 136 (1978) (per curiam).

251. See *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 520, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1974); *In re Dupont*, 322 So. 2d 180, 183 (La. 1975) (judge failed to establish he was prejudiced by limit on discovery); *In re Mikesell*, 396 Mich. 517, 532, 243 N.W.2d 86, 93-94 (1976) (per curiam) (quoting *McCartney*) (judge sought names of all complainants); *In re Bates*, 555 S.W.2d 420, 429 (Tex. 1977) (trier of fact did not abuse discretion by limiting judge to three depositions).

252. See, e.g., *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 520, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1974); *In re Dupont*, 322 So. 2d 180, 183 (La. 1975).

253. See *In re Bates*, 555 S.W.2d 420, 429 (Tex. 1977).

254. See, e.g., *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 520, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1974); *In re Dupont*, 322 So. 2d 180, 183 (La. 1975).

255. See note 82 *supra*. The judge may subpoena individuals to testify including the complainant. See Interview with George J. Kurvers, *supra* note 57, at 2.

256. The hearing begins 30 days after the judge's response to the statement of allegations and the judge is allowed 20 days to respond. See MINN. R. BD. JUDICIAL STANDARDS 8(c)(3), (d)(1), 9 MINN. STAT. 765, 770 (1980). In extraordinary circumstances the Board may extend the hearing date. See *id.* 8(d)(2), 9 MINN. STAT. at 770.

257. Cf. notes 173-77 *supra* (comments of referee indicating that 10-day time period for discovery under old rules is inadequate).

258. But see *In re Inquiry Concerning a Judge*, 356 So. 2d 172, 175 (Fla. 1978) (per curiam). "The period of approximately three and one-half months between the service of

ment of allegations.²⁵⁹ The remaining thirty days is too short a period of time for the judge to conduct discovery.²⁶⁰

Although the Board may extend the hearing date in extraordinary circumstances,²⁶¹ it could be argued that extraordinary circumstances are present in virtually every case because of the limited time for discovery. To allow for adequate discovery and preparation for the hearing by the judge and his counsel, the length of time between the serving of the statement of allegations and the hearing date should be extended.

2. Amendment of Charges

Under Minnesota's present rules, the statement of allegations of misconduct may be amended by leave of the Board or consent of the judge under investigation after commencement of the hearing only if the amendment is technical in nature and the judge is allowed adequate time to respond.²⁶² The rules do not, however, specify what is meant by a "technical" amendment, nor do they indicate if there are procedural requirements for amending the charges prior to the hearing.²⁶³

Two jurisdictions have specifically addressed a due process challenge to an amendment of the formal charges at or before the hearing.²⁶⁴ In each case, the court ruled that if the judge is provided an opportunity to investigate the charge and prepare a defense, no due process violation

notice and the commencement of hearing provided ample time to retain counsel and prepare a defense to the charges." *Id.*

Minnesota's rules were patterned after the ABA rules. *See* Interview with George J. Kurvers, *supra* note 57, at 1. The ABA rules provide the judge should be allowed ample time to prepare for the hearing, and be allowed broad discovery so that formal hearings can be expedited. *See* STANDARDS RELATING TO JUDICIAL DISCIPLINE, *supra* note 57, §§ 5.4, .7 & Commentary, at 36-37. Thus, a lengthier period of time for discovery seems justified.

259. *See* MINN. R. BD. JUDICIAL STANDARDS 8(a)(3), 9 MINN. STAT. 765, 770 (1980) (judge has 20 days to respond to verified complaint or statement of allegations).

260. This is particularly true in light of the Minnesota Rules of Civil Procedure which do not require a response to discovery motions until 30 days following service. *See* MINN. R. CIV. P. 33.01(2), 34.02, 36.01, 9 MINN. STAT. 212, 213, 215-16 (1980). As a result, the judge and his counsel may not receive a response to the discovery motions until the eve of the hearing. A further complication arises when the judge is not only seeking discovery but is requested to furnish information or documents pursuant to the discovery methods allowed. As a result, the judge's ability to investigate and prepare for the hearing is impaired further.

261. *See* MINN. R. BD. JUDICIAL STANDARDS 8(d)(2), 9 MINN. STAT. 765, 770 (1980). What constitutes extraordinary circumstances is not defined under the rules.

262. *See id.* 9(d), 9 MINN. STAT. at 771.

263. In *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (per curiam), the Minnesota court indicated that the notice must be such that the charges are clear and specific, allowing the judge time to prepare his response. *See* note 134 *supra* and accompanying text.

264. *See In re Inquiry Concerning a Judge*, 357 So. 2d 172, 175 (Fla. 1978) (per curiam); *In re Briggs*, 595 S.W.2d 270, 278 (Mo. 1980) (per curiam).

has occurred.²⁶⁵ Therefore, an amendment to the charges prior to the hearing may be constitutionally permissible.²⁶⁶

D. Specific Constitutional Challenges

1. First Amendment Challenges

In several instances, judges have protested the consideration by judicial disciplinary boards of statements made in the performance of their judicial duties on the ground that it is an infringement of their first amendment²⁶⁷ right of free speech.²⁶⁸ Noting that the right of free speech is not absolute, the courts have held that the right is circumscribed by the Code of Judicial Conduct.²⁶⁹ In light of the added responsibilities a judge assumes in taking office and the need for public confidence in and respect for the judiciary, reasonable limits on a judge's exercise of free speech are necessary.²⁷⁰ Thus, judicial conduct that involves the exercise of free speech is not exempt from consideration as an instance of judicial misconduct.²⁷¹

The issue of whether a judge may be disciplined for exercising the first

265. See *In re Inquiry Concerning a Judge*, 357 So. 2d 172, 175 (Fla. 1978) (per curiam); *In re Briggs*, 595 S.W.2d 270, 270-79 (Mo. 1980) (per curiam).

In *Briggs* the respondent judge was provided with a six-day continuance to peruse the evidence that formed much of the basis for the amended charges. See *id.* Further, much of the evidence relative to the amended charges had been elicited at the beginning of the hearing. See *id.* After the continuance, respondent's counsel indicated he was ready to proceed and declined an additional continuance. See *id.* at 278-79. The *Briggs* court therefore ruled there was no want of due process. See *id.* at 279.

Despite its holding, the Florida court acknowledged its prior statement that "there is little necessity and great potential harm in a rule which allows the Commission to set forth additional facts by amendment to the formal charges after the Commission has conducted its hearing and the charges have been filed with this Court." *In re Inquiry Concerning a Judge*, 357 So. 2d 172, 175-76 n.2 (Fla. 1978) (per curiam). The rule allowing such a procedure has been repealed. See *id.*

266. See notes 264-65 *supra* and accompanying text. In a related area, the *Gillard* court noted that due process merely requires that the charges be sufficiently clear and specific to allow the respondent to develop his defense. See note 134 *supra* and accompanying text.

267. U.S. CONST. amend. I.

268. See *Halleck v. Berliner*, 427 F. Supp. 1225, 1240-41 (D.D.C. 1977); *In re Kelly*, 238 So. 2d 565, 568-69 (Fla. 1970), *cert. denied*, 401 U.S. 962 (1971); *In re Rome*, 218 Kan. 198, 205, 542 P.2d 676, 684 (1975) (per curiam).

269. See *Halleck v. Berliner*, 427 F. Supp. 1225, 1241 (D.D.C. 1977); *In re Rome*, 218 Kan. 198, 205, 542 P.2d 676, 684 (1975) (per curiam).

In the case of *In re Kelly*, 238 So. 2d 565, 569 (Fla. 1970), *cert. denied*, 401 U.S. 962 (1971), the Florida court indicated the manner and methods used by a judge in criticizing his fellow judges did not involve the judge's right to freedom of speech and therefore could be considered as conduct unbecoming a member of the judiciary. See *id.*

270. *Halleck v. Berliner*, 427 F. Supp. 1225, 1241 (D.D.C. 1977); *In re Rome*, 218 Kan. 198, 205, 542 P.2d 676, 684 (1975) (per curiam); Note, *supra* note 210, at 695.

271. See *Halleck v. Berliner*, 427 F. Supp. 1225, 1241 (D.D.C. 1977); *In re Rome*, 218 Kan. 198, 205, 542 P.2d 676, 684 (1975) (per curiam).

amendment right of association has arisen in at least two instances.²⁷² The Massachusetts Supreme Court in *In re Bonin*²⁷³ stated that "it is clear that judges . . . must suffer from time to time such limits on [their] rights [of speech and association] as are appropriate to the exercise in given situations of their official duties or functions."²⁷⁴ Thus, the court held that the judge's attendance at a rally that was a fundraiser for a case pending before the court on which he served was improper and discipline for such conduct did not unreasonably abridge his first amendment right to association.²⁷⁵

Similarly, the New York Court of Appeals has held that an investigation of a judicial candidate's campaign activities is not barred on the ground that the activities are absolutely protected by the first amendment.²⁷⁶ According to the court, misconduct that occurs in a political forum cannot be shielded from scrutiny because any first amendment implications are far outweighed by the state's interest in the integrity of the judiciary.²⁷⁷

2. *Ex Post Facto Laws*

In several instances judicial disciplinary proceedings have been attacked on the ground that they violated the constitutional prohibition of

272. See, e.g., *In re Bonin*, 375 Mass. 680, 378 N.E.2d 669 (1978); *Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 409 N.E.2d 818, 431 N.Y.S.2d 340 (1980) (per curiam).

The first amendment provides that: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble." U.S. CONST. amend. I. One commentator indicates this phrase has been construed by the courts to mean "a right to join with others to pursue goals independently protected by the first amendment." L. TRIBE, *supra* note 136, § 12-23, at 702 (emphasis in original).

273. 375 Mass. 680, 378 N.E.2d 669 (1978).

274. *Id.* at 709, 378 N.E.2d at 684.

275. See *id.* at 699-700, 710, 378 N.E.2d at 682, 684-85.

276. See *Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 607-08, 409 N.E.2d 818, 823, 431 N.Y.S.2d 340, 344-45 (1980) (per curiam).

277. See *id.* at 608, 409 N.E.2d at 823, 431 N.Y.S.2d at 345. The *Nicholson* court stated: "In furtherance of the interest in ferreting out corrupt practices, the commission may legitimately request information about solicitations for contributions and attendance at fundraisers." *Id.* at 609, 409 N.E.2d at 823, 431 N.Y.S.2d at 345. The court further stated:

Whether and in what circumstances charges of improper fundraising activities or judicial favoritism ultimately can be sustained against a First Amendment challenge need not now be decided. The mere filing of an administrator's complaint, alleging improprieties in the conduct of an election campaign and its aftermath, simply has too remote an impact on protected rights of political expression to support the instant claim.

In sum, we conclude that the First Amendment does not preclude this investigation. While we would not hesitate to restrain official action that threatens to chill the exercise of First Amendment rights, no such result attends the investigation

Id. at 610, 409 N.E.2d at 824, 431 N.Y.S.2d at 346.

ex post facto laws²⁷⁸ because the alleged misconduct occurred before the disciplinary board was established.²⁷⁹ Because the proceedings are not criminal in nature and their aim is not punishment, the prohibition of ex post facto laws is unavailable as a defense.²⁸⁰ Thus, a judge may be disciplined or removed by procedures not in existence at the time the misconduct occurred.²⁸¹ Due process would, however, require that the conduct be improper when committed.²⁸²

3. Fifth Amendment Privilege Against Self-Incrimination—Refusal to Testify

The privilege against self-incrimination "may be invoked in any proceeding against an individual, either civil or criminal, in which testimony or evidence is requested of that individual which could expose him to later criminal prosecution."²⁸³ In *Spevack v. Klein*,²⁸⁴ the United States

278. Both the Congress and the states are prohibited from passing ex post facto laws. See U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

279. See *Keiser v. Bell*, 332 F. Supp. 608, 620 (E.D. Pa. 1971); *Nicholson v. Judicial Retirement & Removal Comm'n*, 562 S.W.2d 306, 308 (Ky. 1978) (per curiam); *In re Seraphim*, 97 Wis. 2d 485, 492-93, 294 N.W.2d 485, 490 (per curiam), cert. denied, 449 U.S. 994 (1980).

280. See *In re Inquiry Concerning a Judge*, 357 So. 2d 172, 180-81 (Fla. 1978) (per curiam); *Nicholson v. Judicial Retirement & Removal Comm'n*, 562 S.W.2d 306, 308 (Ky. 1978) (per curiam); *In re Seraphim*, 97 Wis. 2d 485, 493-94, 294 N.W.2d 485, 490-91 (per curiam), cert. denied, 449 U.S. 994 (1980); cf. *Keiser v. Bell*, 332 F. Supp. 608, 622-24 (E.D. Pa. 1971) (judge has no constitutional right to be disciplined by procedures existing at time of misconduct and ex post facto claim is without merit).

281. See *Keiser v. Bell*, 332 F. Supp. 608, 624 (E.D. Pa. 1971); *Nicholson v. Judicial Retirement & Removal Comm'n*, 562 S.W.2d 306, 308 (Ky. 1978) (per curiam); *In re Seraphim*, 97 Wis. 2d 485, 493-94, 294 N.W.2d 485, 490 (per curiam), cert. denied, 449 U.S. 994 (1980).

282. See *In re Inquiry Concerning a Judge*, 357 So. 2d 172, 181 (Fla. 1978) (per curiam). The Florida court stated:

Due process . . . contemplates notice that an act is a removable offense at the time it is committed. Any other conclusion would expose judicial officers to the unfair and untenable situation in which even innocent acts of today could someday be declared improper and subject them to punishment or removal from office. . . . Judicial officers are justified in relying on the current rule and in conducting themselves accordingly.

See *id.* The court therefore prospectively applied an amendment to the rules on judicial conduct that allowed a judge to be removed from office for misconduct, even though his motives were good and wholesome. See *id.* at 180-81. The amendment added the following language: "Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office." *Id.* at 180 (footnote omitted).

The Wisconsin court rejected this argument to the extent that the conduct in question occurred prior to the court's becoming constitutionally authorized to suspend or remove a judge. See *In re Seraphim*, 97 Wis. 2d 485, 494, 294 N.W.2d 485, 491 (per curiam), cert. denied, 449 U.S. 994 (1980). The court reasoned that the Code of Judicial Conduct had been in effect at the time the misconduct occurred and therefore the judge knew what kind of conduct was expected of him and that sanctions could be imposed. See *id.* at 493-94, 294 N.W.2d at 491.

283. *Napolitano v. Ward*, 457 F.2d 279, 283 (7th Cir.), cert. denied, 409 U.S. 1037

Supreme Court held that an attorney could not be disbarred for invoking the self-incrimination clause of the fifth amendment.²⁸⁵ One year later the Court in *Gardner v. Broderick*,²⁸⁶ indicated that the *Spevack* decision was inapplicable if the individual invoking the privilege was a public official.²⁸⁷

The *Gardner* Court distinguished *Spevack* on the ground that unlike a lawyer, a public official is directly responsible to his constituency and owes it his entire loyalty.²⁸⁸ "He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer."²⁸⁹ The state, therefore, has the right to inquire whether a public official is properly exercising his duties.²⁹⁰ The *Gardner* Court indicated that a public official may refuse to answer questions relating "specifically, directly, and narrowly" to the exercise of his official duties without being required to waive immunity with respect to the use of his answers in a criminal prosecution.²⁹¹ The official, however, could not use the privilege against self-incrimination to bar his dismissal based on his failure to answer these questions.²⁹²

Following *Gardner*, several courts have held that a judge has no right to refuse to testify in judicial disciplinary proceedings²⁹³ and "can refuse

(1972); cf. *Gardner v. Broderick*, 392 U.S. 273, 276 (1968) ("Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory and the need fully to implement its guaranty."). For a discussion of the *Napolitano* decision, see note 297 *infra* and accompanying text. For a discussion of the *Gardner* decision, see notes 286-92 *infra* and accompanying text.

284. 385 U.S. 511 (1967).

285. See *id.* at 514 (overruling *Cohen v. Hurley*, 366 U.S. 117 (1961)). In *Spevack*, the attorney refused to respond to a subpoena duces tecum requesting the production of financial records on the ground that the records would tend to incriminate him. See *id.* at 512-13. The *Spevack* Court reasoned:

The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him"

Id. at 516 (citation omitted).

286. 392 U.S. 273 (1968).

287. See *id.* at 278. In this case, a policeman was dismissed for refusing to testify at a grand jury proceeding or sign a waiver of his privilege against self-incrimination. See *id.* at 274-75.

288. See *id.* at 277-78.

289. *Id.*

290. See Cohn, *supra* note 227, at 240; cf. notes 291-92 *infra* and accompanying text (judge may be disciplined for failing to answer questions directly related to official duties).

291. See *Gardner v. Broderick*, 392 U.S. 273, 278 (1968). The *Gardner* Court reversed the dismissal of the policeman because his grand jury testimony was demanded in part for the purpose of prosecuting him "and not solely for the purpose of securing an accounting of his performances of his public trust." See *id.* at 279.

292. See *id.* at 278.

293. See *McComb v. Superior Court*, 68 Cal. App. 3d 89, 98, 137 Cal. Rptr. 233, 238 (1977) (review of contempt order for failing to submit to deposition in disciplinary pro-

only to disclose a matter that may tend to incriminate him.”²⁹⁴ A judge’s refusal to testify may be considered against him and is a proper subject of comment.²⁹⁵ In one case, a judge’s invocation of his fifth amendment right in response to questions directly and narrowly related to the performance of his official duties was “in itself sufficient cause for removal of [the] Judge.”²⁹⁶ Further, a grant of transactional immunity in grand jury proceedings does not operate as a bar to consideration of such testimony in judicial disciplinary proceedings.²⁹⁷ Additionally, the furnishing of information or the filing of a response by a judge may constitute a waiver of the privilege against self-incrimination.²⁹⁸

4. Sixth Amendment Rights

The guarantees of the sixth amendment apply only to criminal proceedings.²⁹⁹ Minnesota and other jurisdictions have consistently held

ceeding); *In re* “Judge Anonymous,” 590 P.2d 1181, 1187 (Okla. 1978) (judge refused to testify before judicial disciplinary body). *Bul cf.* *In re* Haggerty, 257 La. 1, 13, 241 So. 2d 469, 473 (1970) (taken for granted that respondent not required to testify).

294. *McComb v. Superior Court*, 68 Cal. App. 3d 89, 98, 137 Cal. Rptr. 233, 238 (1977); *see* *Napolitano v. Ward*, 317 F. Supp. 83, 85 (N.D. Ill. 1970) (“The spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law.”), *aff’d*, 457 F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972); *In re* “Judge Anonymous,” 590 P.2d 1181, 1187 (Okla. 1978) (quoting *McComb*).

295. *See In re Peoples*, 296 N.C. 109, 152, 250 S.E.2d 890, 915 (1978), *cert. denied*, 442 U.S. 929 (1979). Speaking with reference to a judge’s failure to take the stand during a disciplinary hearing, the *Peoples* court stated: “Surely no judge but one with a ‘substantial fear of the results of the investigation’ would have made the elections and followed the course which Respondent has taken in this case.” *Id.*

296. *In re Sarisohn*, 27 A.D.2d 466, 469, 280 N.Y.S.2d 237, 243 (1967) (per curiam), *rev’d on other grounds*, 21 N.Y.2d 36, 233 N.E.2d 276, 286 N.Y.S.2d 255 (1968).

297. *See Napolitano v. Ward*, 457 F.2d 279, 283-84 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972). Initially, the judge refused to testify before a grand jury investigation concerning the administration and management of the Illinois State Fair, for which the respondent-judge had numerous contracts for concession space. *See id.* at 281. In return for his testimony the judge was granted transactional immunity. *Id.* Subsequently, the judge’s testimony was used in disciplinary proceedings against him and he challenged this evidence on the ground that it violated the fifth amendment. *See id.* at 282-83. The court held such testimony was not improperly admitted because judicial disciplinary proceedings are not penal in nature and the transactional immunity was coextensive with the respondent’s privilege against self-incrimination. *See id.* at 284.

298. *See In re Haggerty*, 257 La. 1, 13, 241 So. 2d 469, 473 (1970) (no privilege claimed at time statement was furnished). The court stated: “The voluntary furnishing of his exculpatory version of the incident waives his privilege against testifying . . . since this statement was furnished as part of the removal proceedings.” *Id.* The *Haggerty* court also noted that this privilege “is personal to the witness and may not be claimed by anyone else, not even his own counsel.” *Id.* at 14-15, 241 So. 2d at 473 (citation omitted).

299. *See* U.S. CONST. amend. VI; *cf. In re Rome*, 218 Kan. 198, 204, 542 P.2d 676, 683 (1975) (per curiam) (right to jury trial under sixth amendment extends only to cases in which right existed at common law and judicial disciplinary proceedings do not stem from common law).

that judicial disciplinary proceedings are not criminal in nature.³⁰⁰ Thus, the sixth amendment guarantees of a right to trial by jury, right to counsel, and right of confrontation are not applicable to judicial disciplinary proceedings.³⁰¹ Minnesota and other jurisdictions, however, allow the respondent-judge to have counsel³⁰² and to confront witnesses.³⁰³

VI. CONCLUSION

The Minnesota Board on Judicial Standards represents a significant improvement over the traditional methods of judicial discipline. The Board has generated an increased awareness of the need to discipline the misconduct of judges and provides an accessible forum for handling complaints of judicial misconduct. Recent cases in Minnesota and elsewhere indicate that the proceedings generally comply with due process.³⁰⁴ There are, nevertheless, several areas in which Minnesota's proceedings run afoul of due process requirements or notions of fundamental fairness.³⁰⁵ To provide greater protection for the rights of the individuals involved, several changes in the procedures are necessary.

First, if the Board decides to conduct an in-depth investigation, the rules should provide that the judge be notified of the complaint and allowed to respond. Second, because informal discipline presently constitutes an adjudication, the rules of the Board should be amended to provide a judge with a due process right to notice and an opportunity to

300. See *Keiser v. Bell*, 332 F. Supp. 608, 619 (E.D. Pa. 1971); *McComb v. Commission on Judicial Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 9, 564 P.2d 1, 5, 138 Cal. Rptr. 459, 464 (1977) (per curiam); *In re Gillard*, 271 N.W.2d 785, 812 (Minn. 1977) (per curiam); *Sharpe v. State ex rel. Okla. Bar Ass'n*, 448 P.2d 301, 307 (Okla.), cert. denied, 394 U.S. 904 (1968).

301. See notes 299-300 *supra* and accompanying text.

In several instances judges have unsuccessfully argued that they were entitled to a jury trial. See *McComb v. Commission on Judicial Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 10, 564 P.2d 1, 6, 138 Cal. Rptr. 459, 464 (1977) (per curiam); *In re Rome*, 218 Kan. 198, 204, 542 P.2d 676, 683 (1975) (per curiam); cf. *In re Seraphim*, 97 Wis. 2d 485, 495-96, 294 N.W.2d 485, 492 (per curiam) (no due process right to jury trial), cert. denied, 449 U.S. 994 (1980). In addition, courts have held a judge does not have a sixth amendment right to confront witnesses. See *Keiser v. Bell*, 332 F. Supp. 608, 619 (E.D. Pa. 1971); *In re "Judge Anonymous,"* 590 P.2d 1181, 1188 (Okla. 1978). But cf. note 303 *infra* and accompanying text (judges are allowed to cross-examine witnesses in some jurisdictions).

302. See, e.g., *In re "Judge Anonymous,"* 590 P.2d 1181, 1188 (Okla. 1978); MINN. R. BD. JUDICIAL STANDARDS 10(b), 9 MINN. STAT. 765, 771 (1980) (rule makes specific reference to counsel on behalf of judge); cf. *In re Inquiry Concerning a Judge*, 357 So. 2d 172, 176 (Fla. 1978) (per curiam) (judge not denied right to counsel; simply failed to retain one who could arrange schedule to represent him).

303. See, e.g., *In re Haggerty*, 257 La. 1, 30, 241 So. 2d 469, 479 (1970); *In re Bates*, 555 S.W.2d 420, 434 (Tex. 1977); Interview with George J. Kurvers, *supra* note 57, at 2; cf. *In re Briggs*, 595 S.W.2d 270, 278 (Mo. 1980) (per curiam) (respondent-judge cross-examined witnesses whose testimony formed basis of several charges against judge).

304. See notes 113-303 *supra* and accompanying text.

305. See notes 219-25, 232-34, 259-61 *supra* and accompanying text.

be heard. Alternatively, the power of the Board should be limited to issuing a warning or a reprimand. Third, the period allowed for discovery should be extended to allow a judge time to prepare adequately for the formal hearing. Finally, because of the adversarial function of the Board, it is recommended that all formal proceedings be conducted by a lawyer or judge who is not a present or past member of the Board.³⁰⁶ If such a rule were implemented both the appearance and possibility of impropriety or bias by the Board would be avoided.³⁰⁷

306. The rules provide that the factfinder at the hearing is either the Board, a three-member panel of the Board, or a referee who is either a judge or a lawyer. *See* MINN. R. BD. JUDICIAL STANDARDS 9(a)(1), (3), 9 MINN. STAT. 765, 771 (1980). The Board's general practice is "to have an independent referee serve as the factfinder during the formal hearing." Interview with George J. Kurvers, *supra* note 57, at 2. This practice should be adopted formally as a rule of procedure.

307. *But cf. In re Hanson*, 532 P.2d 303, 307 (Alaska 1975) (no due process violation for Commission to have option to refer matter to master or hear matter itself). As the *McDonough* court noted, in the future the Board could seek to avoid the assumption of an adversary posture. *See* note 180 *supra*.